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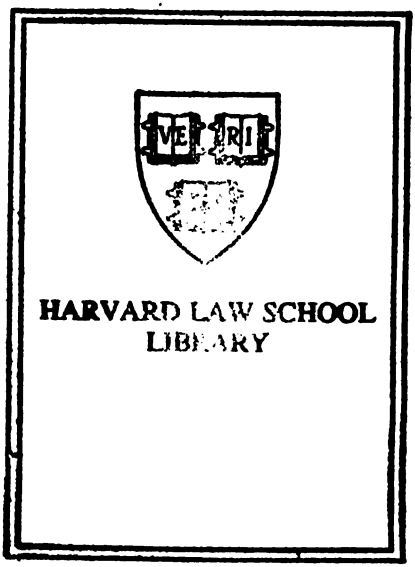

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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 28 TO DECEMBER 22, 1910

JAMES M. REASONER
STATE REPORTER

VOL. 163

FIRST EDITION

CHICAGO
CALLAGHAN & CO.
1911

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JUNE TERM, 1910.*

PEOPLE *v.* STEWART.

1. CRIMINAL LAW—EVIDENCE—OPINION—IDENTIFICATION—TRIAL.
   Prejudicial error does not result from permitting a witness to give his opinion that a person whom he saw on the night the alleged crime was committed was respondent, and afterwards striking it out on discovering, from further examination, that he had no sufficient basis for the opinion.

2. SAME—ARSON—IDENTITY OF RESPONDENT.
   It was not error to submit the case to the jury under evidence that respondent, charged with arson, alighted from a car just before the fire, near the place of it, and that the conductor of the car knew her, and that she got on another car about two hours later, and subsequently denied, to the sheriff, having alighted from the car at the point described.

3. SAME—IDENTITY—EVIDENCE.
   Identity is not necessarily to be proved by direct evidence, but may be established by circumstances pointing to one person.

4. SAME.
   That conflicting testimony as to the time of the fire was introduced, a part of which, given by respondent's witnesses, tended to show that she could not have set the fire in the time which she had, did not require the direction of a verdict.

5. TRIAL—ARGUMENT—CRIMINAL LAW—ARSON.
   While it was reprehensible for the prosecuting attorney to state, in his argument, that it is common knowledge that people burn buildings for insurance, no prejudice can be held to have resulted, in view of the fact that the court instructed the jury to ignore the statement. HOOKER and MOORE, JJ., dissenting from the conclusion that the argument was improper.

6. ARSON—VARIANCE—INFORMATION.
   Although the information charged respondent with setting fire to three buildings, she might properly be convicted of the offense if the proofs showed that she set fire to one of them.

*Continued from Vol. 162.

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7. SAME—IDENTITY—EVIDENCE.
Held that the testimony of the conductor of a car, who identified respondent, was for the jury.

8. NEW TRIAL — CRIMINAL LAW — VERDICT — AFFIDAVITS OF JURORS.
On motion for a new trial, in a prosecution for arson, affidavits of jurors showing that they considered the failure of respondent to take the stand as a witness, may not be received to impeach the verdict.

9. SAME—WEIGHT OF EVIDENCE.
Held that the weight of evidence did not require the granting of a new trial.

Exceptions before judgment from Lenawee; O'Mealey, J. Submitted November 12, 1909. (Docket No. 165.) Decided September 28, 1910.

Laura A. Stewart was convicted of arson. Affirmed.

John A. Riley and *Smith, Baldwin & Alexander*, for appellant.

Burton L. Hart, Prosecuting Attorney, and *Earl C. Michener*, Assistant Prosecuting Attorney, for the people.

BLAIR, J. The respondent was convicted upon an information charging that on the 23d day of March, 1908, she—

"Feloniously, unlawfully, and wilfully did set fire to and burn certain buildings, to wit, one frame dwelling house on section twenty-three (23), one frame barn on section twenty-three (23), one frame building on section twenty-three (23), all in said township of Palmyra, said buildings then and at the time of the committing of the felony aforesaid, being insured against loss or damage by fire by the Farmers' Mutual Fire Insurance Company of Lenawee county, with intent then and thereby to injure the said Farmers' Mutual Fire Insurance Company of Lenawee county, the insurer of said buildings as aforesaid," etc.

On the night of March 23, 1908, an unoccupied dwell-

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ing house and two barnes belonging to respondent were destroyed by fire. The buildings were located a few rods south of the Lake Shore Railway track and about half a mile west of Grosvenor, a station at the junction of the main line and the Fayette branch. From Grosvenor a highway known as the Al. Harrison road runs south, intersecting the Toledo & Western Electric Railway at Parker's schoolhouse, about half a mile from Grosvenor. About 60 rods east of the Parker schoolhouse, on the Toledo & Western line, is a stopping place known as the "Parker Stop." The village of Blissfield is about a mile and a half east of the Parker Stop. West of the Parker schoolhouse, about one-half mile, the electric line crosses the Fayette branch, and the crossing is known as "Harrison's Crossing." Harrison's Crossing is distant a little more than a half mile from respondent's buildings.

"You could get to Harrison's by climbing one fence if you passed in a straight line, passed down Mrs. Stewart's lane, and climbed over the wire fence into her field. It is then clear field all the way except the Lake shore track. By going a little bit to the west, you could go through there by climbing one fence. These fences were the ordinary wire fences, 58-inch fence. It would be close to a mile and a half to go around the road from Harrison's stop to the Stewart buildings. * * * There is a lane running south from the Stewart buildings to the woods and Mr. Gambee's lane runs west up to her place. I do not know as these lanes meet. Mrs. Stewart's lane leads south to her pasture or wood lot. Then you go across this pasture or wood lot of hers, and you strike the Gambee lane going east to the Al. Harrison road."

The electric line runs from Toledo, its eastern terminus, to Adrian, its western terminus. Respondent left Adrian for Toledo at about 3 o'clock in the afternoon of March 23d, intending to stop over at Blissfield in order to collect some money due her from Jackson Rogers. She left the house of Mr. Rogers about 6:30 p. m., saying she was going to visit Elias Adriance. The station agent of the electric line testified that he "noticed her around there

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about the time the 6:41 limited car went west, but did not see her after the car went through." The conductor of the west-bound car due at Blissfield at 6:41 p. m. testified that the car was seven or eight minntes late at Blissfield; that the respondent came to the vestibule of the car, and asked him if the car stopped at Harrison's Crossing, and he told her it depended on whether the man was there to throw the derailer; sometimes he was there and threw it for them and sometimes he was not; that she said she wanted to go there and would take the chances; that she got off the car at Harrison's Crossing at about 6:56 or 6:57 p. m. Respondent boarded the east-bound car at Parker's Stop between 8:10 and 8:13 p. m., and continued her journey to Toledo.

There is a sharp conflict in the testimony as to when the fire broke out. The time of the discovery of the fire, as stated by the witnesses for the people, ranged from 7:15 to 7:30 p. m., standard time. The witnesses for the respondent placed the time at, or a few minutes before, 7 p. m., standard time. Several of the witnesses going to the fire met a woman going south on the Al. Harrison road. The third day after the fire a woman's tracks were found near respondent's barn and in her lane and in the Gambee lane leading into a clover field 60 or 80 rods from the Al. Harrison road. Respondent told the sheriff that, after supper at Jackson Rogers', she went over to Elias Adriance's house and found no one at home, and that she then went out to the car line and walked west and met the car at Parker's Stop. According to one of the witnesses, Elias Adriance lived in Blissfield about a block north of the electric line, and about a mile and a half from the Parker Stop. Respondent was convicted, and brings the record to this court for review upon exceptions before sentence.

We shall discuss such of the assignments of error argued by counsel for respondent as in our opinion merit consideration. The principal assignments relate—

(1) To the admission of certain testimony for the pur-

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pose of identifying respondent with the woman met by certain of the witnesses on the Al. Harrison road.

(2) The refusal of the court to direct a verdict of acquittal.

(3) Prejudicial argument by the prosecuting attorney to the jury.

(4) The instruction of the court that, if respondent set fire to and burned either of the buildings mentioned and set forth in the information, she should be found guilty.

(5) The refusal of the court to give respondent's 20th request to charge.

(6) The refusal of the court to grant respondent's motion for a new trial.

1. William McMillen, a witness for the people, testified:

"It was raining that night, disagreeably rainy night. I met a lady in front of Al. Harrison's house about half a mile north of the Toledo & Western Railway. This lady was Mrs. Stewart, and I knew her by her walk."

On cross-examination the witness testified that, on the examination in justice's court, he said he could not describe the woman except that she wore dark clothing, and that he did not know the woman for certain.

"What has taken place since you were sworn before that justice of the peace that has made you certain, if you were not certain then?

"*A.* Have I said I was certain that was Mrs. Stewart?

"*Q.* Didn't the prosecutor just now ask you who the woman was, and didn't you say it was Mrs. Stewart, the defendant?

"*A.* That is my best judgment.

"*Q.* Didn't you testify upon that examination that you didn't know whether she was white or black?

"*A.* Yes, sir.

"*Q.* And that was the truth, wasn't it?

"*A.* Yes, sir."

On redirect examination the witness was asked:

"*Q.* Mr. McMillen, following up that testimony, wasn't you asked, 'Did you have some judgment that night as to who it was?' and didn't you answer, 'I did?'

"*A.* Yes, sir.

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"*Mr. Riley:* I move to strike out that question and answer. He is asking the witness as to his judgment.

"*Mr. Hart:* I am asking if the testimony wasn't that on the examination. * * *

"*Q.* State now what your best judgment was as to the person you met that night, who she was?

"*A.* Mrs. Stewart."

To the admission of this answer, respondent took exception and assigns error. After further examination of the witness by the circuit judge, he said:

"I think this testimony may all be stricken out of this record as to the identity. The present view of the court is that this is too visionary. There is nothing of substance upon which the conclusion could rest as to the identity of that person."

Ora Butts also testified in behalf of the people as to the identity of this same woman; that he met a woman about 15 rods from Al. Harrison's, going south.

"She wore dark clothes and a hat with very little trimming on it, dark colored, and I noticed the general walk of the person and her general appearance. We passed this lady, I was afoot with Mr. Miller, and went to the fire. She was on the east side of the road. I spoke to her. I said, 'Good evening,' and she made no reply."

In the course of the examination of this witness the following occurred:

"*The Court:* Gentlemen, that we may have an understanding about striking out the testimony of the other witness on this question that is reserved here, it is merely the opinion of the witness that is stricken out, and not the facts and circumstances detailed by him and from which he attempted to and did draw an opinion; but it is the opinion itself, and that alone that is stricken out of the testimony.

"*Mr. Hart:* As I understand, the question was reserved until morning with this witness?

"*The Court:* Yes, sir.

"*Mr. Michener:* Then the only question is, they may detail everything they saw, but they can't give an opinion who that person was?

"*The Court:* His personal opinion and conclusion is

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what was stricken out. All of this testimony besides that remains in the case."

After this announcement by the court, the following occurred:

"*Q.* Now, on the night in question, when you met this lady on the highway, did you notice anything about the lady that you would be able to state who it was?

"*A.* What do you mean by that?

"*Q.* Anything about the dress or appearance or walk or anything?

"*A.* I went by the walk, and I noticed her hat as much as anything.

"*Q.* And you had known Mrs. Stewart a long time before that?

"*A.* Yes, sir.

"*Q.* And knew her general walk?

"*A.* I did.

"*Q.* I will ask the question, you may state, Mr. Butts, who the lady was you met, if you know. * * *

"*The Court:* I think, until there is more in this case than there is at the present time, that the objection to this opinion may be sustained. I don't think that what is offered here rises to the dignity of evidence. In the detail of the testimony given here, upon which this witness is asked to pass an opinion, there isn't anything shown, that the court discovers, that is out of the ordinary that would identify this particular lady. I think this objection may be sustained."

Later the witness was asked:

"*Q.* Did you notice the hat the lady had on that night?

"*A.* I did.

"*Q.* You may state now whether you have seen the hat since?

"*A.* I saw it once since—the day of the hearing of the examination in Mr. Humphrey's office when Mrs. Stewart had on that hat."

Witness was then shown a hat marked "Exhibit C," and testified that he had never seen the hat before, and that the lady he met in the road near Harrison's on the night of the 23d of March was not wearing that hat. Several witnesses, including a milliner who claimed to

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have sold a new hat to respondent at Toledo on March 24th, testified that the hat (Exhibit C) was the old hat that she was wearing on the 23d of March, and that the hat was left in Toledo for several days, and the new hat worn in its place.

Counsel for respondent contend that it was error for the court to permit the witness William McMillen to state that the woman he met in the highway on the night of the fire was the respondent, and also to permit the witness to give his best judgment upon the question after the court had stricken out his answer that it was the respondent, and also complained of the same rulings as to the testimony of Ora Butts. In the course of the charge to the jury the court used the following language:

"You are instructed that the testimony of the witnesses William McMillen and Ora Butts as to their opinion that they identified the defendant on the night in question, has been stricken out, and you will not consider the same in your deliberations."

We do not think it can be said, under the repeated rulings of the court and his final instructions to the jury at the close of the case, that the jury could have been misled into supposing that they were at liberty to consider the opinion of the witnesses McMillen and Butts as identifying the respondent with the person met.

2. We think the court would not have been justified in directing a verdict of acquittal; on the contrary, it seems to us that, in the absence of any affirmative testimony on the part of the defense to explain the whereabouts of respondent during the period between her leaving Mr. Rogers' house at 6:30 p. m. and her boarding the car at Parker's Stop at 8:10 p. m., the record fully sustains the verdict. Her connection with the crime is not established by direct testimony as to her participation, but by the converging force of numerous circumstances which point quite clearly in one direction. The case largely hinges upon the testimony of the conductor of the 6:41 west-bound car. While it is true that this witness failed at first to

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pick out the respondent when asked to do so, and while his testimony as to how he identified her is somewhat incoherent, he still affirmed positively that she was on his car that night, that he had seen her before, and knew her name.

"I am positive that she was the lady that got on my car at Blissfield that night, and who got off at Harrison's Crossing."

The testimony of the conductor is also supported by the testimony of the station agent, who testified that he saw her around the station when the 6:41 car went through, but did not see her after it had gone. It is true that respondent, in her statement to the sheriff, denied having gone to Harrison's Crossing, but such statement was only to be considered with the remainder of her statement, and not as substantive testimony in her behalf in the case.

The jury were certainly at liberty to disbelieve the testimony of the conductor and station agent, if they saw fit to, but they also had the right to accept it, if convinced of its truth as establishing the fact of respondent's alighting from the car at Harrison's Crossing, and to consider this fact in connection with her denial that she had gone there. This fact being established, as the jury must have found it was, it is difficult to resist the conclusion that the woman who was met on the Al. Harrison road within half a mile of the fire and going south towards the electric line was the same woman who boarded the 8:15 car at Parker's Stop, and who had left the west-bound car at Harrison's Crossing. Identity is not necessarily proved by direct evidence, but may be proved by circumstances all pointing towards one person. There are other circumstances disclosed by the testimony which also support our conclusion, but to refer to which would unnecessarily extend this opinion. The principal fact which is inconsistent with the people's case is disclosed by the testimony of respondent's witnesses that the fire took place at, or just before, 7 o'clock, standard time, in which event the re-

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spondent could not possibly have traveled from Harrison's Crossing over half a mile and set the fires in the three or four minutes allowed her for that purpose. Some of respondent's witnesses testified with great positiveness that they discovered the fire at 7 o'clock, and noted the time by their watches. There were other witnesses, however, upon the part of the people, who testified that the fire broke out at various times from 7:15 to 7:30, standard time. This conflicting testimony manifestly raised a question of fact, which was for the jury to determine.

3. In the course of his argument to the jury, the prosecuting attorney said, "It is common knowledge that people burn buildings for insurance," to which remark respondent's counsel reserved an exception, and the court said:

"I think, gentlemen, you should take nothing from that statement."

One of the questions in the case was the question of motive for the destruction of the buildings, and respondent produced witnesses who testified that the insured buildings were worth considerably more than the amount of the insurance, and that it was a loss to respondent, instead of a gain, to have the buildings destroyed. This remark was certainly reprehensible, but, in view of the court's correction, and presuming that the jury was possessed of average common sense, we do not think that the remark could have seriously prejudiced the defendant's case.

4. We think the charge of the court was correct. The offense was committed by burning any one of the buildings, and it was not necessary to prove the burning of all three, although she was charged in the information with burning that number. We are also of the opinion that respondent's ownership of the buildings was sufficiently proved by the application and policy of insurance, the proofs of loss, and the testimony of numerous witnesses.

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5. By the 20th request to charge, respondent requested that the jury be instructed:

"That the testimony of conductor Jacobs as to the identification of the defendant is not sufficient for your consideration. The witness did not show sufficient knowledge of her so that his opinion rises to the dignity of evidence, and therefore you will not consider the same."

We think that it is clear that the court would not have been warranted in giving this instruction, since the probative force of the testimony of the witness was for the jury.

6. We find no error in the refusal of the court to grant respondent's motion for a new trial. This motion is based upon the affidavits of two jurors to the effect that the jury considered the failure of respondent to take the stand as a witness in her own behalf, and that they consented to the verdict of conviction largely for this reason. As we have heretofore held, the affidavits of jurors are not receivable to impeach their verdict. *In re Merriman's Appeal*, 108 Mich. 454 (66 N. W. 372). Neither do we think that the court erred in his ruling that the verdict was not against the weight of the evidence. As we have heretofore stated in our opinion, there was an abundance of evidence, if satisfactory to the jury, to justify their verdict. The charge to the jury was mainly in the language of respondent's requests to charge, and we see no reason to doubt that the respondent had a fair trial. The exceptions are overruled and the record remanded for further proceedings in pursuance of law.

BROOKE and OSTRANDER, JJ., concurred with BLAIR, J.

HOOKER, J. (*concurring*). I do not concur in the statement that it was reprehensible for the prosecutor to say in his argument that "it is common knowledge that people burn buildings for insurance." It is as much a fact of which courts and juries may take judicial notice as is the fact commonly known that men commit burglary, robbery, and homicide for gain.

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There should be no impropriety in saying to a jury any of these things in a case where the proof warrants the submission of such a question to the jury, for, if it is possible to suppose a juror ignorant of such fact, it would be full time to advise him of it.

I agree in affirming the verdict in the case.

MOORE, J., concurred with HOOKER, J.

W. H. HILL CO. *v.* GRAY & WORCESTER.

1. CONTRACTS—RESTRAINT OF TRADE—INJUNCTION.
   An injunction will not issue upon a bill of complaint of a drug manufacturer to prohibit a corporation engaged in the sale of drugs, from buying a medical preparation, made under a secret process, from dealers or jobbers who are under contract to sell the article at a fixed price to accredited agents of the manufacturer, and from retailing the preparation at a price lower than that fixed by a system of contracts between the manufacturer and the dealers throughout the country, since the contracts and system operate as an unreasonable restraint upon competition.[1] Following *Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 82 C. C. A. 58 (12 L. R. A. [N. S.] 185).

2. SAME—TRADE-MARKS AND TRADE-NAMES.
   The fact that an article of commerce not patented is sold under a trade name or in trade dress affords it no exemption from the common law or statutory rules against restraint of trade.

Appeal from Wayne; Murphy, J. Submitted April 18, 1910. (Docket No. 43.) Decided September 28, 1910.

Bill by the W. H. Hill Company against Gray & Wor-

[1] As to legality, under modern anti-trust acts, of agreements restricting the class of persons to whom commodities shall be sold, see note to *Cleland* v. *Anderson* (Neb.), 5 L. R. A. (N. S.) 186.

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cester to enjoin the sale of certain drugs in violation of a trade agreement. From a decree dismissing the bill, complainant appeals. Affirmed.

Keena, Lightner & Oxtoby, for complainant.

Chamberlain, May, Denby & Webster, for defendant.

STONE, J. The complainant corporation for some years past has been engaged in the manufacture and sale of proprietary medicines, including specially Hill's Cascara Bromide Quinine, a cold cure in tablet form. It is claimed that this preparation has acquired a reputation with the public as being an efficient remedy, and that the good will of complainant therein is a property right of great value. The tablets are, and since the year 1900 continuously have been, put up by complainant in a distinctive package and dress. These tablets are made under and in pursuance of a secret formula which is the sole property of complainant, and it has the exclusive right to the formula under which the tablets are made, and also to the name of the preparation, and to the peculiar or distinctive dress in which it has been marketed by complainant. It is also claimed that the demand for this article has been created with the consuming public by its merits, and by extensive advertising on the part of complainant. There are upon the market, available to the public, quantities of other preparations in tablet form, for similar purposes, and many druggists throughout the country put up and sell similar preparations on their own account. The price of complainant's said preparation to the consumer is 25 cents for a small box, and complainant has at all times sold its preparation at fixed prices. The policy of the complainant has been to refuse to sell its preparation to any dealer upon more favorable terms than to others, to discourage the giving of secret rebates upon its goods by the jobber to the retail druggist, and to require the sale of its preparation at the equal price aforesaid to the consuming public.

The bill states: That since the spring of 1905 said

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preparation has been sold only upon what is known as the direct contract plan; each carton or dozen boxes of said preparation is marked with a distinctive serial number, and each box contained in each carton is similarly identified, and in each carton there is placed a record card which, under said direct contract plan, is returned to complainant by the wholesale druggist, upon a sale of said preparation, showing to whom said preparation has been sold; that, as a part of said direct contract plan, complainant enters into a direct retail agency contract with any and all retail druggists who are desirous of selling its preparations; that no discrimination is made by complainant, and that all druggists are given full opportunity of signing said contract, and of obtaining complainant's preparation at fixed and uniform prices; that, under a contract with the wholesale druggist, said preparation can be sold and delivered only to druggists who have entered into a contract with complainant. Said retail agency contract contains the following provisions:

"In consideration whereof, said retail dealer hereby agrees not to sell or furnish at any price the said proprietary medicines to wholesale or retail dealers not accredited agents of the said company; nor to any other person, firm or corporation at less than the retail price fixed by the said W. H. Hill Company and printed upon each package."

The retail price of Hill's Cascara Bromide Quinine is fixed by said contract at 25 cents a box. The said wholesale agency contract contains the following clause:

"In consideration whereof, said wholesale dealer hereby covenants and agrees not to furnish or sell any of the proprietary remedies manufactured by the said W. H. Hill Company to any persons, firms or corporations, to whom said W. H. Hill Company may, at any time, notify said wholesale dealer not to sell any of its medicines."

The bill further states: That contracts had been signed by complainant with more than 1,500 retail druggists in the State of Michigan, and that the purpose of said method of selling complainant's preparation was to prevent secret

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rebates in prices and discrimination on the part of wholesale druggists and others in favor of or against particular retail druggists, and to prevent cutting of prices and demoralization of trade, and the injury which would result therefrom to the reputation and good will of complainant's business, and especially to its said preparation; that the said plan of sale of said preparation has been generally adopted, and, with few exceptions, said wholesale druggists and retail druggists have observed the terms of said contract, and especially that said preparation has been sold at the uniform price of 25 cents a box; that on or about March 1, 1906, the defendant executed with complainant one of said retail agency contracts, and in pursuance thereof defendant secured, in the usual course of business, through the wholesale dealer, such quantities of said preparation as it desired, and, as far as complainant was advised, defendant observed the terms of said contract until November, 1907, or thereabouts; that in the month of December, 1907, said defendant notified complainant that it desired to cancel said contract of March 1, 1906, and it was thereupon surrendered by defendant; that on or about January 10, 1908, defendant began advertising in the Detroit papers that it was selling Hill's Cascara Bromide Quinine at 20 cents a box; that defendant did sell complainant's preparation at this price, and in all such sales, before the filing of the bill of complaint, as far as appears, the serial number printed on the side of the small boxes was obliterated.

It is claimed that the defendant, after canceling its contract with complainant, knowing that it could not secure complainant's goods from wholesale dealers who were advised of the cancellation of the contract, did not buy its goods in Detroit, but obtained them in Boston and in New York from wholesale jobbers, who undoubtedly sold to it under the impression that it was still under contract with complainant; that the defendant, well knowing the situation and desiring to cover up its fraud in thus securing the goods, obliterated the

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numbers as above stated. The complainant asked the court to enjoin defendant from selling its said preparation at a price less than 25 cents a box; also from securing for sale complainant's preparation, by inducing a breach of contract on the part of the wholesale dealers, or others under contract relations with complainant; and also from mutilating the boxes containing said preparation.

In its answer the defendant denied that the purpose of the method of selling complainant's preparation was as set forth in the bill, but avers that the purpose was to keep the selling price of the article—then an article of common use in the State—at a fixed and graduated figure in order to create a monopoly, and secure the profits of that monopoly; that the purpose and effect of said method of selling complainant's preparation and the contracts incident to said method formed, among the wholesale and retail dealers entering into said contract, a combination, or trust to carry out a restriction in trade or commerce, and control the price of said commodity, and prevent free competition among and between said wholesale and retail dealers so combining, and free competition between such wholesale and retail dealers and other independent dealers, who may be desirous of competing; and that complainant's method of selling its preparation had in fact resulted in practically a complete monopoly of the trade and commerce in said preparation, and that each of said contracts set forth in complainant's bill was, and the combination of said contracts forming complainant's so-called method was also, illegal and fraudulent as a restraint of trade and commerce both at common law, and under the laws of the State of Michigan, and especially in violation of the provisions of Act No. 255, Pub. Acts 1899, and are absolutely void, and not enforceable either in law or equity. The defendant denied all fraudulent conduct, combination, and collusion as alleged by complainant, and averred that, after the cancellation of said contract, it purchased said preparation in the regular and ordinary course of business in the open market. The complainant offered

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evidence tending to support its bill. Defendant offered no evidence.

The secretary of the complainant testified, among other things, that it had altogether about 25,000 contracts with retail dealers throughout the United States. That was only an estimate. On cross-examination he testified as follows:

"The primary purpose of the contract plan evidenced by the exhibits is to fix the price of Hill's Cascara Bromide Quinine at 25 cents to the consumer, and to fix the price to the wholesaler at the figure fixed in the wholesale contract. If the contract is lived up to, there will be no competition in the sale of Hill's Cascara Bromide Quinine, as far as the price is concerned.

"*Q.* What other competition could there be?

"*A.* Well, the competition of two jobbers in one town getting the business.

"*Q.* How could they get the business? It is the same commodity that they are trying to sell?

"*A.* Yes, sir.

"*Q.* They are not allowed to cut the price?

"*A.* Not at all.

"*Q.* Then, how would they get the business except by cutting the price?

"*A.* By personal solicitation.

"*Q.* For the same article?

"*A.* For the same article.

"*Q.* At the same price?

"*A.* Yes, sir.

"*Q.* And that is the only competition that you can think of?

"*A.* Yes, sir.

"*Q.* As I understand it, the real purpose of this contract system is to keep up the price of Hill's Cascara Bromide Quinine to 25 cents to the consumer?

"*A.* That is the main object.

"*Q.* Under any and all circumstances?

"*A.* Yes. We have about 1,800 of these contracts in the State of Michigan, at the present time, and at the time the bill of complaint was filed we had something over 1,800. This includes not only the druggists, but also, in the smaller communities, general stores, which handle a great many proprietary articles. There are about 1,700

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druggists in the State of Michigan, and I would say of that number 1,500 are bound by the terms of our contract. That insures the company as far as the price goes a practical monopoly on the article.

"*Q.* And the W. H. Hill Company does as a result of these contracts have a monopoly in the State of Michigan?

"*A.* If you care to term it so, yes.

"*Q.* Well, what do you term it? Can you tell us any other term to use in connection with it, rather than monopoly?

"*A.* Why naturally, the Hill Company would have a monopoly of their own goods.

"*Q.* Well, then, that term applies to the situation?

"*A.* Oh, yes. The contract which Gray & Worcester had with our company was canceled by mutual consent on the 4th of December, and from that time until the present Gray & Worcester had no contract relations with the company."

Upon the hearing the learned circuit judge held that complainant's contracts were void as being in restraint of trade, and a final decree was entered dismissing the bill of complaint. The complainant has appealed.

In a lengthy brief, and in an able oral argument, complainant's counsel claim that its said contracts are valid and enforceable, and that they are not in restraint of trade at common law, and are not in violation of any statute. Our attention has been called to two recent cases decided by the United States circuit court of appeals for the sixth circuit. The opinions were written by Mr. Justice Lurton, and were concurred in by the other members of the court. *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 82 C. C. A. 158 (12 L. R. A. [N. S.] 135); *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 164 Fed. 803, 90 C. C. A. 579. In the first case Hartman was the manufacturer of the well-known proprietary medicine called "Peruna." This he put upon the market through a system of contracts intended to maintain prices. The system there adopted was so nearly like the one we are here considering that it need not be here described. In fact, complainant's counsel admit that, if said opinions of Mr. Justice

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Lurton are right, they expect this court to follow them as decisive of the case. An examination of the cases above referred to, and of the cases there cited and reviewed, has been made. The opinion in the *Hartman Case* deals with every phase of this case. It cites many authorities and covers more than 20 pages, and its length prevents a full quotation. There the bill of complaint was demurred to. The doctrine of the case may be briefly stated as follows: The exemption from the common-law rule against monopoly and restraint of trade, and the provisions of the Federal anti-trust act of July 2, 1890, chap. 647, 26 Stat. 209 (U. S. Comp. Stat. 1901, p. 3200), which has been extended to contracts affecting the sale and resale, the use, or the price of articles made under a patent, or productions covered by a copyright, does not extend also to articles made under a secret process, or medicine compounded under a private formula. While the owner of the patent or copyright is protected in his exclusive right by the statute which gives him a monopoly, there is no statute which protects one who makes or vends an article which is made by a secret process or private formula, nor, so long as he keeps his process secret, can he bring himself within the principle of the statute which grants a temporary monopoly in consideration of the full publication of the invention or work. The owner of a secret process or formula is not protected by law in his secret, but he may protect himself by contract against its disclosure by one to whom it is communicated in confidence, or restrict its use by such person, and such contracts are not in restraint of trade because of the character of the property right in the secret which would be destroyed by its disclosure, and because it is not in itself an article of commerce, *but such considerations do not apply to contracts for the sale of the manufactured product which do not involve a disclosure of the secret, and such contracts are within the rules against restraint of trade.* The trading stamp and railroad ticket cases, such as *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 135 Fed. 833,

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and *Nashville, etc., R. Co.* v. *McConnell*, 82 Fed. 65, rest upon the peculiar character of the property rights involved. Neither concerns the buying and selling of articles of general commerce, and both relate to things in the nature of contracts personal in character, and not to things which can ever become the subject of general trade and traffic.

It does not follow, because a secret process or formula for a medicine will be protected against betrayal by employés, or those to whom it has been communicated in confidence, that a system of contracts for the control of all sales and subsales of the medicine when once made will be outside of the rules in restraint of trade simply because it is the product of such secret formula or process. The preparation when ready for the market and the formula are two separate and distinct things. Freedom of traffic in that is consistent with its value, and does not involve expense of the formula. None of the reasons which apply to patented articles, copyrighted productions, or to restricted disclosure of the secret formula itself, apply to the product of the formula. The cases directly in point opposed to this view are *nisi prius* decisions except one in the circuit court of appeals for the third circuit. The fact that an article of commerce is sold under a trade-name or in trade dress affords it no exemption from the common-law or statutory rules against restraint of trade.

Where the sole manufacturer of a medicine, made in accordance with a secret formula, but unpatented, sold the same only under a system of contracts between himself and wholesale dealers, to whom alone he sold at uniform prices by which they bound themselves to sell at a certain price, and only to retail dealers designated by him, and between him and such retail dealers, by which, in consideration of being so designated, they bound themselves to sell to consumers only and at a certain price, and such contracts had been entered into, as the manufacturer alleged, by a large majority of the wholesale and retail druggists in the United States, it was held that such

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system of contracts was *prima facie* illegal both at common law as in unreasonable restraint of trade, and under the Federal anti-trust act as aforesaid, where it affected interstate sales, its purpose and effect being to prevent competition between purchasers of the medicine, both wholesale and retail, and that, in the absence of allegation of facts showing it to be necessary for the protection of the manufacturer's business, a court of equity would not aid in the enforcement of the contracts by granting an injunction to prevent a defendant, who was not a party thereto, from buying the medicine from purchasers who were, and reselling the same at any price it might see fit. A single contract, although it be such as, taken alone, may not be within the rule at common law against contracts in restraint of trade, which is one of a great number of identical contracts made between the producer of an unpatented article of commerce and dealers therein, forming a "system" of contracts, which, taken as a whole, materially affects the public interests by stifling competition and trade in said article, is an unreasonable restraint, and within the rule at common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and object of the system of contracts, and not merely ancillary or incidental to another and legitimate object.

In view of the evidence in this case showing the number and scope of the contracts, and the establishment of a "system," the following excerpt from the opinion in the *Hartman Case* is pertinent:

"Assuming that these contracts operate only as a partial, and not a general, restraint, a question which we do not concede, and that they are properly to be considered as covenants ancillary to a principal contract, are the restraints thereby imposed necessary to protect the complainant in his retained business, or to protect him from an unjust use of the articles by the purchaser? In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a

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multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. So, also, the question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal, rather than the ancillary, matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. A common purpose unites each covenantee to every other, and the 'system' is to be construed as 'one piece,' in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenantee to sell only at the prices dictated by the manufacturer constitutes one general scheme. The question here is therefore one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee. In *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 148 Fed. 939 [78 C. C. A. 567, 19 L. R. A. (N. S.) 143], where was involved a combination in restraint of trade, and where each wholesaler and retailer in the business had executed separate but identical contracts with the corporation representing the combined manufacturers, we held that each such separate covenantee was a party to the general scheme for enhancing prices. This was rested upon the holding that the several agreements constituted one whole. See, also, observations of Judge Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 275, 29 C. C. A. 141 (46 L. R. A. 122), and of Justice Peckham in *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45, 46 (24 Sup. Ct. 307).

"The plain effect of the 'system of contracts,' the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is, first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price and to only such persons

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as will sign one of his system of contracts. The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to any one who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers who supply the public is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about."

Referring to the claim that defendant knew complainant's plan, and that in selling to defendant each dealer thereby breached his contract, the following extract from said opinion is appropriate here:

"That Park & Sons Company knew complainant's plan of business, and that in selling to them every such vendor thereby breached his agreement, is also charged, and for the purpose of the demurrer, admitted. What is the result? Did the defendants by so purchasing, with knowledge of the restrictions imposed upon sales, thereby enter into contractual relations with complainant? Manifestly not. Did they obtain the absolute title, notwithstanding their knowledge that the sale was in breach of restrictions imposed upon the seller? Undoubtedly. The restrictions imposed by complainant upon sales and resales, if valid at all, are only so because they constitute personal contracts upon which an action will lie only against the contracting party. *Garst* v. *Hall & Lyon Co.*, 179 Mass. 588 (61 N. E. 219, 55 L. R. A. 631). A prime objection to the enforceability to such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery. The right of alienation is one of the essential incidents of a right of general property in moveables, and restraints upon alienation have been generally regarded

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as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave, or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in Coke on Littleton, § 360, 'be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.' It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel, so as to follow the article and obligate the subpurchaser by operation of notice."

The opinion in the *Hartman Case* was written in March, 1907. A writ of certiorari was issued by the Supreme Court of the United States to review the decision. But the writ was dismissed on December 21, 1908, upon motion of petitioner. After the decision of the *Hartman Case*, the drug company sought to evade that decision by means of a consignment contract so-called, and that case was before the same court in September, 1908. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, *supra*. In this last case, after disposing of the consignment contract, Justice Lurton said:

"This case must, after all, turn upon whether there is such identity of character between the statutory monopoly of articles made under valid patent or copyright and articles made according to some private formula, as to exempt them from the principles which apply to contracts which tend to create a monopoly, or restrain trade when the subject is an article not made under a patent or copyright or secret formula. * * * There are decisions by most respectable courts which hold that articles, such as proprietary medicines, are outside of all rules and statutes which forbid contracts in restraint of trade, because they are made under a secret formula. Some, if not most, of these decisions have been made in cases in which the Dr. Miles Medical Company has been a party. They are cited and commented upon by this court in the case of

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John D. Park & Sons v. *Hartman, supra.* They go upon the conceded fact that a trade secret or formula is a monopoly until discovered by fair means, and will be protected against abuse by one who learns it under a contract limiting its use, or in the confidence of an employment. They do not observe any distinction between the necessary monopoly of the secret itself and the unnecessary monopoly of the articles made according to the secret process, and offered for sale and resale to the consuming public. Neither do those decisions recognize any distinction between the statutory monopoly accorded to articles protected by a patent or copyright and those made under such private formula. * * * In the case referred to, we reached with unanimity the conclusion that no legal, economic, or moral reason existed for regarding contracts in respect to the vast and ever-increasing commerce in proprietary medicines as either outside of the mischief intended to be remedied by the Federal statute against monopolies, or the rules of the common law, or within the statutory protection afforded by the patent and copyright statutes. Any other conclusion would be to sanction a monopoly in that class of goods vastly more far-reaching than the monopoly extended upon high grounds of public policy to the inventor. The statutory monopoly has a limitation of a few years. To obtain it, the inventor must put on record his invention. At the end of the term, the public will be free to employ the discovery without the burden theretofore imposed as a compensation to the inventor. Not so with the monopoly asked for by those who control the enormous proprietary trade of this country. Their monopoly will go on forever, and, if there be merit in their formula, they may not only preserve it through all time, but continue to restrain prices and prevent competition in the sale of the product.

"It is said that the proprietor of such a secret remedy need never communicate his formula. Concede this. To say that he need never compound his medicine, and that, if he does, he need not sell it unless he chooses, is undoubtedly true. But as much may be said about any article which the producer may choose to make or not to make, sell, or not sell, as he wills. So much pertains inherently to the natural freedom of man in respect to his own actions. But, if he elects to make and sell a product according to his formula, a public interest is affected if he be permitted to restrain freedom of trade in the article, when it has once passed under the dominion of a buyer.

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* * * The mere fact that one article or class of articles is made under an unknown and private formula, and another class is not, is an undeniable fact which may serve for some purposes to differentiate them. But that single fact does not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraints of trade.

"We need not repeat the argument by which we reached the conclusion that the system of contracts which Hartman sought to enforce through the injunctive power of a court of equity was obnoxious, not only to the statute of congress against restraints and monopolies in respect of interstate trade, but inimical also to the reasonable restraints which at common law may be imposed as ancillary to a principal contract."

In our opinion the arguments and reasoning of the able court that decided these cases meet and answer every position advanced by complainant's counsel in this case. We are content with the reasoning, the citation, and review of authorities, and the conclusion reached by that court, and we think that they are decisive, and controlling of every question here involved. We note in passing that there is no evidence in this record showing that the defendant purchased any goods from any person or firm that had been notified not to sell to it. Crittenden & Co., the Eastern Drug Company, and all other dealers in contract relation with complainant had a right to sell to defendant whose name was listed, unless notified not to do so, in any view of the case. But we place our decision upon the ground that complainant's system of contracts deals with the manufactured product of its secret process, and not with the process itself, and that the system of contracts, being a restraint upon free competition, falls within the common-law prohibition of restraints of trade, and is void.

Having reached this conclusion, it is unnecessary to decide whether or not such contracts are illegal and void under the statute of this State.

The decree below will be affirmed, with costs.

OSTRANDER, HOOKER, MOORE, and BLAIR, JJ., concurred.

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COELING v. GREEN.

1. CHATTEL MORTGAGES—CONDITIONAL SALES—LIEN.
   Under a contract conveying an interest in a business without an express reservation of title, but providing that, on failure to pay the balance of the purchase price, title should revest in the seller, the purchaser obtains the title subject to a mortgage lien of the seller; and the transaction does not constitute a conditional sale.

2. SAME—RECORD—AFFIDAVIT.
   Filing such contract without an affidavit of good faith, as provided for by Act No. 332, Pub. Acts 1907, renders the transaction void as to a subsequent purchaser in good faith.

3. SAME—NOTICE.
   In the absence of proof of actual notice of the existence of the contract, a purchaser of the business does not take it with notice.

Error to Kent; McDonald, J. Submitted April 19, 1910. (Docket No. 85.) Decided September 28, 1910.

Replevin by Tite Coeling against William Green and Edward N. Barnard. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Smedley, Hall & Freeland, for appellant.

Mahar & Barnard, for appellees.

BLAIR, J. This is an action of replevin to recover possession of certain personal property purchased by defendant Barnard of defendant Green. The rights of the parties depend primarily upon the construction to be given to an agreement in writing between plaintiff and defendant Green. The agreement contained, among others, the following clauses:

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"A Contract to Purchase.

"This option to purchase, made and entered this 3d day of January, A. D. 1908, between Tite Coeling, of the city of Grand Rapids, party of the first part, and William Green, of the same place, party of the second part, witnesseth, as follows:

"Whereas, said parties are joint owners of a so-called vaudette show, known as the North Star, and located at No. 212 Plainfield avenue, in the city of Grand Rapids, Michigan, and they desire to sever their interests in said show in the following manner, viz.: Said first party, for and in consideration of the sum of one hundred dollars ($100) to him in hand this day paid by said second party, the receipt whereof is hereby confessed and acknowledged, and the promise on the part of the second party to pay to him the further sum of two hundred dollars ($200) at the time and in the manner hereinafter specified, and to carry out and fulfill all the other covenants of this agreement, hereby agrees to sell and give immediate possession of all his interest in said show of every nature and kind, including the following named property: * * *

"And said second party hereby promises and agrees to pay to said first party the two hundred dollars ($200) above mentioned eighteen (18) months from and after the date of this agreement, in full settlement for all his interest in said show and the above-described goods, and upon such payment of the two hundred dollars ($200) the title to said second party in said show and above described goods and chattels becomes under this agreement absolute and complete. And said first party has no further right or interest in or to them, or any part thereof.

"And it is hereby further agreed between the parties hereto that in case said second party fails or refuses to pay to said first party the said two hundred dollars ($200) at or before the time above mentioned, or perform the other covenants of this agreement, such failure shall work a forfeiture of this agreement, and said first party's right and title to a half interest in said show and the above-described goods and chattels shall be revived, and he shall become reinvested with the title to a one-half joint interest in said show, and goods and chattels, and he may keep and retain the one hundred dollars ($100) thus paid to him by said second party mentioned as stipulated damages for the use and benefit of

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said show and goods and chattels by said second party during the continuance of this agreement."

The plaintiff contends that this agreement amounted to a conditional sale, reserving title in plaintiff until payment of the full purchase price. Defendant insists that the agreement was, in effect, a chattel mortgage, and that, if a conditional sale, plaintiff could not maintain replevin against his co-tenant. The circuit judge held with defendant Barnard as to both propositions, and directed a verdict in his favor. To reverse the judgment entered upon the directed verdict, plaintiff prosecutes this writ of error.

It is apparent that legal terms were loosely used in the agreement; but, construing all of the provisions together, we think it fairly appears that it was the intention of plaintiff to part with his title to the property, and not to reserve title thereto. The provision that upon payment of the $200 "the title to said second party in said show and above-described goods and chattels becomes under this agreement absolute and complete" is not necessarily inconsistent with this view, but may well mean that upon such payment such title is unaffected by any lien or right of the vendor. In fact, in view of the subsequent clause, this would seem to be the natural meaning. The subsequent clause clearly shows that the title was deemed to be in Green, but that upon his failure to perform his contract Coeling's title should be revived, "and he shall become reinvested with the title," etc. We are therefore of the opinion that the circuit judge did not err in his construction of the contract. *Choate* v. *Stevens*, 116 Mich. 28 (74 N. W. 289, 43 L. R. A. 277).

The contract was executed on the 3d day of January, 1908, and was filed with the city clerk January 18, 1908, but without the affidavit required by Act No. 332 of the Public Acts of 1907. The mortgage was, therefore, void as against subsequent purchasers in good faith. *People, ex rel. Esper*, v. *Burns*, 161 Mich. 169 (125 N. W. 740). It is claimed, however, that defendant Barnard was not a

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subsequent purchaser in good faith, because chargeable with notice of what was actually on the record. There is no claim or proof of actual notice, and since the agreement was not entitled to record, but its filing positively forbidden, it was no notice whatever to Mr. Barnard.

In view of what has been said, it becomes unnecessary to discuss the other questions argued in appellant's brief.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and STONE, JJ., concurred.

LUFKIN RULE CO *v.* SECRETARY OF STATE.

CORPORATIONS—STOCK AND STOCKHOLDERS—SALES—RESTRICTION ON TRANSFER.

A proposed amendment to the articles of association of a corporation providing for the issuance of additional capital stock, to be known as option stock, to be issued to employés, subject to the right of the corporation to repurchase it on specified terms, operates as an unlawful restraint upon the right of transfer, and is unauthorized by statute. Act No. 317, Pub. Acts 1905.

Mandamus by the Lufkin Rule Company to compel Frederick C. Martindale, secretary of State, to record an amendment to relator's articles of association. Submitted May 3, 1910. (Calendar No. 23,959.) Writ denied September 28, 1910.

Humphrey, Grant & Baker, for relator.

John E. Bird, Attorney General (*Arthur P. Hicks*, of counsel), for respondent.

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BLAIR, J. The Lufkin Rule Company is organized under Act No. 232, Public Acts of 1903, for the following purposes:

"To manufacture and deal in measuring tapes, measuring rules and goods of like character; to carry on and conduct a general mercantile and manufacturing business; to manufacture and deal in any and all kinds of articles, tools, machinery, goods, wares and merchandise."

In the month of February, 1910, it offered for record in the office of respondent the following amendment to its articles of association:

"ARTICLE 5*a*. Two hundred fifty thousand dollars ($250,000.00) of the increase of the capital stock is set aside for sale only to employés of the corporation, and said two hundred fifty thousand dollars ($250,000.00) of stock, or any part thereof, shall be subject to purchase by the corporation at any time within two years after the employé to whom the same is sold ceases from any cause to be an employé or officer of the company, upon the payment by the corporation to the owner thereof, as shown by the books and records of the corporation, of the then true book value of the stock, together with the dividends due thereon, less any indebtedness of such owner to the corporation. Upon the payment or tender of payment of such purchase price to such owner, the title to such stock and all beneficial interest therein shall thereupon vest in the corporation, without any further act on its part or on the part of such owner, and the corporation shall then be entitled to have the certificates issued for such stock assigned and transferred to it, and such stock may be again resold and reissued by the corporation to its employés, subject, however, to the same rights of purchase as before. The corporation shall not have the right to make such purchase while it is insolvent, or if such purchase should render it insolvent, and shall only pay for such purchases out of its net profits. This stock shall be known as 'option stock,' and the price at which it is sold shall be taken as the consideration for the corporation's retaining the option to purchase. Option stockholders shall have all the rights, privileges, powers, and benefits of other stockholders, including the right of alienation, subject only to such rights of purchase by the corporation. Certificates issued for option stock shall contain on their

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face a statement showing the option to purchase as aforesaid and the conditions thereof."

Upon the advice of the attorney general, the repondent refused to record this amendment, and in his letter of refusal stated as his reasons for such refusal:

(*a*) Because it creates a new class of stock different in character from common and preferred stock provided in said Act No. 232.
(*b*) Because it prevents and restrains the alienation and transfer of the stock.

The relator now asks for a peremptory mandamus to compel respondent to record the amendment so refused. It is the contention of respondent that the peremptory writ should not issue, for the following reasons:

(1) Because the amendment will operate to restrain the transfer of stock.
(2) Because the amendment provides for the issuance of a kind of stock not authorized by law.
(3) Because a corporation organized under Act No. 232 has no right to purchase its own shares.
(4) Because the amendment in effect authorizes a forfeiture of shares and expulsion of the stockholder.

Section 16 of the act in question provides:

"The stock of every such corporation shall be deemed personal property, and be transferred only on the books of such corporation, in such form and manner as their by-laws shall prescribe, and such corporation shall at all times have a lien upon all the stock or property of its members invested therein, for all debts due from them to such corporation."

Section 24 and subsequent sections provide for the enforcement of the corporation's lien by sale of the stock "for cash at public auction to the highest bidder therefor." These provisions constitute the only restriction, if they may be so characterized, upon the transfer of the stock. Section 7 of chapter 55 of the Revised Statutes of 1846 provides for a transfer of shares of stock by indorsement and delivery of the certificates thereof; "but such transfer shall not be valid, except between the parties thereto,

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until the same shall have been so entered on the books of the corporation," etc. This provision is retained in the amendment of 1905. Act No. 317, Pub. Acts 1905. As was said in *Rough* v. *Breitung*, 117 Mich. 48 (75 N. W. 147):

"Such certificates, in the absence of some provision of law to the contrary, stand upon the same basis as commercial paper, and innocent purchasers and pledgees take title by assignment and delivery."

Although section 16 above quoted limits the mode of transferring the shares to entries on the corporate books, it was not intended thereby to change the essential character of the property, and doubtless a transfer by indorsement and delivery of the shares would, as between the parties, pass the equitable title thereto, which could be converted into the legal title by compelling the proper transfer on the books of the corporation. The provisions of the fourth subdivision of section 2 and of section 35 limit the corporation to the creation and issuance of "certificates for two kinds of stock, viz., general or common stock and preferred stock," etc. We do not think it was intended by the provisions of the ninth subdivision of section 2 to authorize the corporation to create an essentially different class of stock than the classes specified, or to authorize any material change in the character of the property rights evidenced by the certificates. Our statutes having placed shares of stock in the category of personal property, and the certificates thereof approximating in character commercial paper, the same right of disposal of them must attach to their ownership as to the ownership of other classes of personal property, and such disposal is beyond the restrictive control of the corporation, except as granted such control by statute, or perhaps by the express contract of the owner. 10 Cyc. pp. 359, 577, 578, 579.

Does the amendment in question operate to restrain the free disposition of the shares provided for therein? We

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think it clearly does. The corporation itself is restricted to sales to its own employés and officers. If its employés do not take the stock, not a share of it can be sold, no matter how beneficial or necessary such sale may be to the welfare of the corporation. Restraint would be placed upon the shareholder's right of transfer, since he could not pass a title, which could be converted into an absolute title, independent of the consent of the corporation. The manifest scheme of the amendment is to keep the shares perpetually under the control of the corporation, and to prevent any person obtaining an unqualified ownership thereof. Such scheme is incompatible with the right of disposal, which is an incident to the ownership of shares of stock, against public policy as embodied in our statutes, and the amendment was properly rejected by the secretary of State. We do not determine the questions, argued at considerable length, whether a corporation may purchase its own stock, nor whether it may contract with a purchaser of its shares for the right to repurchase such shares, since in the view we have taken such determination is unnecessary.

The writ is denied.

OSTRANDER, HOOKER, MOORE, and STONE, JJ., concurred.

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MAST v. PURCHASE.

TRUSTS—ACCOUNTING—MINES AND MINERALS—FIDUCIARY RELATIONS.

Complainant subscribed the sum of $1,000 towards the purchase of a lease covering certain oil lands and a completed well, and this sum and all other subscriptions were placed in the hands of one of the defendants, a subscriber to the enterprise, under a trust agreement. The payments to the trustee amounted to $12,500, of which he expended only $3,500 in purchasing the lease, retaining the remainder of the funds in his hands and claiming to have expended the entire amount. He, in fact, owned a two-thirds interest in the lease, a circumstance which he concealed from the other promoters. On a bill filed to compel an accounting, *held* that the trustee must be charged with his own subscription to the fund and must account for the entire amount remaining in his hands above the purchase price of the lease.

Cross-appeals from Washtenaw; Kinne, J. Submitted June 16, 1910. (Docket No. 73.) Decided September 28, 1910.

Bill by Theodore E. Mast against George H. Purchase and others for an accounting. From the decree rendered, all parties appeal. Modified and affirmed.

Robert E. Bunker, for complainant.

Andrew J. Sawyer, *M. J. Lehman*, *B. M. Thompson*, and *Thomas A. Bogle*, for defendants.

MCALVAY, J. The controversy in this case arose out of a certain transaction relative to the purchase of a lease of oil lands for the sum of $12,500, which transaction is evidenced by the following writing:

"**Oil Proposition.** It is understood by the undersigned that Charles W. Miller of Detroit, Michigan, who is at present time engaged in drilling oil wells in East Tilbury

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township, Ontario, has acquired a lease upon one hundred and forty-six acres, more or less, in the township of East Tilbury, Kent county, Ontario, being parts of lots eight and nine, concession eleven, and that the said Charles W. Miller and his associates now offer to the undersigned their interests in this lease with one well drilled to the sand and properly cased, for the sum of twelve thousand five hundred dollars, and for the purpose of raising the said twelve thousand five hundred dollars, we, the undersigned, hereby agree to pay the amounts set opposite our respective names and to receive for that amount an interest in the entire lease and well, in the following proportion: Five hundred dollars buying one twenty-fifth of the entire proposition. We further agree to pay the amount of our respective subscriptions to George H. Purchase, who is hereby appointed trustee for the purpose of acquiring and paying for said lease and taking charge of the same until the completion of the first well, or until such time as the subscribers hereto shall make different arrangements."

This was signed by complainant and the defendants, each for the amounts set opposite his or her name.

Mr. Miller lived in Detroit, and, before this transaction, had business relations with defendant Purchase dealing in oil leases. According to the testimony of Purchase, Miller acquired this lease, known as the "Denison lease," in January, 1906, and Purchase acquired a two-thirds interest in it from Miller in April following, which he was to have for financing this lease; and at the time the foregoing "oil proposition" was prepared Purchase claims he was the owner of such interest. Mr. Miller does not agree with Purchase as to this transaction between them relative to the Denison lease, but counsel for complainant in their brief accept the version of Purchase of that transaction as correct. The "oil proposition" was prepared by defendants Purchase and Glenn in Detroit late in August, 1906. Defendant Glenn testifies that he entered into the employ of Purchase selling shares in the Denison lease venture at the time the subscription paper (oil proposition, *supra*) was prepared. Glenn was the active party in securing subscriptions to the full

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amount of $12,500, which was all paid in, and $10,000 of which Purchase admits came into his hands as trustee. The balance, as appears from his statement, Glenn used with his knowledge and consent for the claimed purpose of buying the influence of a man in order to succeed in getting the shares all sold. The record shows that there was no truth in such claim. Glenn testifies that Purchase and Miller fixed the price on the property at $12,500 with one well completed to the sand, and he started out at once to sell shares. The first thing Glenn did was to subscribe $500 to the "oil proposition," and then Purchase signed for a like amount. Complainant was among the subscribers to the amount of $1,000. The account filed by Purchase on the hearing shows that Miller was paid for the lease but $1,500, and for the well put down by him $2,000.

Some months after paying in his money, complainant came into reliable information that only $3,500 was paid for the lease and the well, and that Purchase, the trustee, retained in his hands moneys belonging to the subscribers not accounted for. He thereupon filed this bill of complaint charging that he was deceived and defrauded by Purchase and Glenn and fraudulently induced by them to subscribe such money, and asking for an accounting and a receiver, making all the subscribers to the "oil proposition" parties defendant. No company or corporation was ever formed or organized. Whatever was done relative to buying some machinery and putting down a second well was accomplished by all the parties acting together voluntarily. The details of what was done later need not be given because not material to the questions in dispute. Purchase and Glenn and also defendant Woodworth answered separately denying complainant's charges. The majority of the other defendants answered admitting the allegations of the bill of complaint and asked for a receiver and an accounting. After issues joined, and before the hearing, Purchase and Glenn, the principal defend-

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ants, requested a jury to try the issues of fact in the case. Upon this application questions were settled and submitted to the jury which sat and heard the testimony.

The following are the questions submitted to the jury, together with the answers given:

"(1) *Q.* Did the defendants Purchase and Glenn represent to Theodore E. Mast that the amount which was to be paid for the said Denison lease to C. W. Miller was $10,500?

"*A.* Yes.

"(2) *Q.* Did said defendants Purchase and Glenn represent to said complainant Theodore E. Mast that the land covered by said lease was valuable oil land?

"*A.* Yes.

"(3) *Q.* Did the defendants Purchase and Glenn represent to said complainant that they had an option on the Denison lease?

"*A.* Yes.

"(4). *Q.* Did the defendants Purchase and Glenn pay to the owners of said Denison lease the sum of $10,500?

"*A.* No.

"(5) *Q.* Did the defendants Purchase and Glenn or either of them represent to complainant before the closing of said contract for the purchase of said Denison lease that said lease was owned by Charles W. Miller and his associates?

"*A.* No.

"(6) *Q.* Did the complainant at the time of closing the contract for the purchase of said lease rely upon the statement, if one was made by either Glenn or Purchase, that Miller was the sole owner of said lease?

"*A.* Yes.

[Signed] "K. H. WHEELER, Foreman.

"Ann Arbor, March 27, 1908."

The case was then submitted to the court, and a written opinion was filed, in which, among other things, the court stated and found as follows:

"This cause has now been heard upon pleadings and proofs and the service and protection of a jury have been invoked by the defendants Purchase and Glenn, and the findings of the jury are now a matter of record. It is manifest that these defendants must fail to extract any

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comfort from the report of the jury. The action of the jury is only advisory, and the cause returns to the court for final adjudication. The evidence in the case in my opinion fully establishes all of the material allegations of the bill of complaint. There might have been some plausibility in his action if the defendant Purchase had denied his trusteeship and refused an accounting, but his accounting is one of the most remarkable exhibitions of the execution of a trust that this court has ever examined. The defendant Purchase received these subscriptions upon the representation by him and his agent the defendant Glenn that this oil lease in the hands of Miller, the owner thereof, would cost the sum of $10,500. The evidence is incontrovertible that he only paid the said Miller for such lease the sum of $2,500, and that he thoroughly understood such to be the fact when he obtained these subscriptions upon the basis of an alleged cost of $10,500. It rests in doubt if even the $2,500 were wholly expended for this purpose. In the accounting of defendants Purchase and Glenn a very cowardly but wholly futile attempt was made by them to involve Prof. John R. Rood and Dr. Louis P. Hall. The evidence on this trial removes every possible suspicion or insinuation against either of these gentlemen and establishes beyond all controversy that they have acted in these matters with the utmost good faith, honor, and integrity."

But little need be added relative to what this record discloses. The findings of the jury and of the trial judge are in all respects supported by the evidence. The refusal of Purchase to account to these people for the $12,500 cash which was collected from them for him, as trustee, and which he and Glenn held, and the accounting which was filed by him, together with his entire testimony given during the trial, indicate the character of this witness.

The statement of the account filed by him, as taken from the opinion of the court, is as follows (the receipt of $12,500 having been admitted):

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DISBURSEMENTS.

Special expense in Ann Arbor (being the amount paid by said Glenn to buy certain mining stock of one Ortman for the use and benefit of said Glenn)	$2,000 00
Paid to C. W. Miller (for his interest in the Denison lease)	1,500 00
To C. W. Miller, contract for drilling well No. 1 at a profit of $500	2,000 00
To E. C. Glenn for one-third interest in the lease, $1,500.00, and one block of stock valued at $500.00	2,000 00
To G. H. Purchase for one-third interest in lease at $1,500.00, and one block of stock valued at $500.00	2,000 00
Contract price (allowed by said Purchase to said Glenn) for filling the subscription list	3,000 00
	$12,500 00

In this account is included his own and Glenn's subscription charged as cash. In the final decree in the court below in the accounting, Purchase and Glenn were given credit for $1,000, the amount of their subscriptions, and also for $1,000 claimed to have been paid Miller on the Hascall-Sloan and Denison leases. The testimony of these witnesses upon this proposition is unreconcilable. Miller says that the Denison lease was to be charged with but $700. Purchase says the $1,000 was paid Miller as his share in the profits of the Hascall-Sloan lease, and nothing was paid for any interest in the Denison lease. He cannot find fault if this testimony of his is taken as true. It would seem to be corroborated by the fact that in his accounting he has already claimed credit for $1,500 paid Miller for his interest in the Denison lease. Both items should be charged in this accounting against them. The subscriptions, because they should be required to stand their share of losses; the other item, because it was never paid. This would make the amount to be accounted for $9,000, with interest from September 1, 1906.

The decree of the circuit court is affirmed, except as hereinabove indicated. A decree will be entered in this

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court accordingly, and the cause will be remanded to the circuit court for such further proceedings as may be proper. Complainant will recover costs of both courts against defendants Purchase and Glenn.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

GOODWIN *v.* UNION INSURANCE CO. OF PHILADELPHIA.

1. INSURANCE — WEIGHT OF EVIDENCE — FRAUDULENT REPRESENTATIONS.
   In an action on a fire insurance policy, in which defendant claimed a change in the title to the insured property, and fraud of the insured, *held* that a verdict for the plaintiff was supported by sufficient evidence.

2. SAME—EVIDENCE—HEARSAY—PROOFS OF LOSS.
   While the proofs of loss are inadmissible, if unsupported by testimony of their correctness, to show the value of the property destroyed, it was not error to receive them as evidence of compliance with the policy, or as evidence of the value, after the plaintiff had used them to refresh his recollection and had testified to the correctness of the items.

3. SAME—TITLE—CONVEYANCE OF PROPERTY—DELIVERY.
   It appearing that plaintiff had conveyed the property to his wife previously to the fire, and had placed the bill of sale on record, a showing that he had done so without the knowledge of his wife, to conceal the property from his creditors, tended to rebut the presumption of delivery and raised an issue of fact for the jury.

4. SAME—CONTRACTS—CONSTRUCTION.
   It was proper to charge the jury that certain riders attached to the insurance policy might be considered in determining whether or not the insured had informed the agent as to the true state of the title.

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5. SAME—FOREIGN CORPORATIONS—VERDICT.
The court will not assume, without proof, that the jury was prejudiced against the defendant because it was a foreign corporation.

6. TRIAL—ARGUMENT—CONDUCT OF COUNSEL.
Remarks of counsel in argument directed at defendant's counsel personally, and of an uncourteous nature, cannot be held to have influenced the verdict.

Error to Wayne; Rohnert, J. Submitted June 10, 1910. (Docket No. 38.) Decided September 28, 1910.

Assumpsit by William P. Goodwin against the Union Insurance Company of Philadelphia on a policy of insurance. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Lehman, Riggs & Lehman, for appellant.

Bernard B. Selling, for appellee.

BIRD, C. J. This is an action upon a Michigan standard fire insurance policy to recover for a loss which the plaintiff suffered to his saloon and café in Mt. Clemens on the 31st day of December, 1906. The total amount of insurance carried by the plaintiff was $10,000, divided among several companies. The policy in suit was one for $1,500. The claimed loss was $5,936.19. The jury found that the loss was $5,388, and apportioned $808.20 of this sum to the policy in suit, and judgment was rendered for that amount against the defendant. A motion for a new trial was made and denied, and defendant assigns error thereon.

The grounds urged by defendant for a reversal of the case are:

(1) The verdict was against the weight of evidence and was contrary to the law and to the charge of the court.
(2) It was error to permit the proofs of loss to be used as evidence of value.
(3) That the court erred in refusing to direct a verdict

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for the defendant on the ground that the property was conveyed to his wife prior to the fire.

(4) Because the court did not construe the riders attached to the policy for the benefit of the jury.

(5) That the verdict was due to the natural prejudice of the jury against foreign corporations, and especially against a foreign insurance company.

First. On the part of the defense, it was insisted that the plaintiff was not the unconditional and sole owner of a large part of the insured property at the time the policy was issued, and that the property was afterwards incumbered by a chattel mortgage without the knowledge or consent of the defendant, and that, by reason thereof, all rights under the policy were forfeited. It was further charged that plaintiff was guilty of fraud in claiming damages to property which he never owned, and of making false and fraudulent statements in his proofs of loss. Plaintiff answered these charges by claiming that the state of plaintiff's title was fully disclosed to the agent prior to the issuance of the policy, and that there was no chattel mortgage upon the property at the time of the fire. Plaintiff denied the allegations of fraud. There was a spirited contest over these issues at the trial, and much testimony was taken bearing on them. Nearly all of the issues presented questions of fact and were submitted to the jury.

The jury reduced plaintiff's claim several hundred dollars, and doubtless rejected some of the items that were in dispute. It would be unprofitable for us to attempt to review all the testimony which made for or against these claims. It is sufficient to say that, after having examined the record with much care with reference to them, we are not persuaded that the verdict was against the weight of the evidence. We think there was testimony, which, if believed by the jury, would furnish a basis for the verdict which they returned. Neither are we persuaded that the verdict was contrary to the law or to the charge of the court.

Second. Complaint is made that the proofs of loss were

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used to prove the value of the property destroyed or damaged and were submitted to the jury for that purpose. If this use was made of the proofs of loss without any further evidence of the value and the correctness of them, it was error. *Kennedy* v. *Insurance Co.*, 157 Mich. 411 (122 N. W. 134); *Cascade, etc., Ins. Co.* v. *Publishing Co.*, 1 Wash. St. 452 (25 Pac. 331); *Williams* v. *Insurance Co.*, 54 Cal. 442 (35 Am. Rep. 77). But we do not understand the record to show that this was done. At the outset of the trial, plaintiff's counsel offered in evidence the proofs of loss, but the court declined to receive them, except for the purpose of showing a compliance with the stipulations of the policy. Subsequently plaintiff held them in his hand while testifying, and swore to the value of each article in the order in which it was inventoried in the proofs of loss. He testified that he had assisted in making the proofs of loss. Our understanding is that the witness used them for the purpose of refreshing his recollection. At the close of the trial, the proofs of loss were readmitted without objection, and the jury allowed to inspect them. We think there was no error in this. It would be difficult, indeed, for one who might sustain a loss to a stock of merchandise or to household goods to enumerate each item while on the witness stand without having recourse to a memorandum to refresh his recollection.

Third. This complaint relates to the refusal of the court to direct a verdict for the defendant on the ground that the property had been conveyed by plaintiff to his wife previous to the fire. Plaintiff testified that he had conveyed the property to his wife without her knowledge, and placed the bill of sale of record to keep the property out of reach of his creditors, and that the bill of sale was never delivered to her. The court submitted the question of delivery to the jury, and from their verdict it must be assumed that they found that there was no delivery of the paper. These facts bring the case within the ruling of *Hogadone* v. *Insurance Co.*, 133 Mich. 339 (94 N. W.

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1045). Defendant argues that the case is ruled by *Kaufman* v. *State Savings Bank*, 151 Mich. 66 (114 N. W. 863, 18 L. R. A. [N. S.] 630, 123 Am. St. Rep. 259), and *Bangs* v. *Browne*, 149 Mich. 478 (112 N. W. 1107). An examination of the latter cases will disclose that a presumption of delivery was raised by the acts and statements of the grantors and these presumptions were not rebutted, while in the *Hogadone Case*, and in the one before us, the presumption of delivery arising from the act of making the deed and placing it of record was rebutted by the positive testimony of the plaintiff that he never delivered it. This raised a question of fact which was proper to submit to the jury, and we think the trial court was in no error in so doing.

Fourth. There were two riders upon the policy, describing the property insured, and it was insisted by the defendant that the language used therein should be construed to mean that the plaintiff was the unconditional and sole owner of the property, while the plaintiff claimed that the language of the riders did not import unconditional and sole ownership, but bore out the testimony of the plaintiff that he informed the agent of the state of his title before the policy was issued. Upon this question the court first charged the jury as follows:

"That it must clearly appear by the rider that that was the intent; otherwise it is not an exception to the terms of the stipulation of the policy with regard to an unconditional ownership. It must clearly appear in the rider that it was intended to make an exception."

Subsequently, at the request of plaintiff's counsel, the court charged the jury upon that question as follows:

"I withdraw from your consideration the constructions to be placed upon the language of the riders as far as my instructions to you permitted you to determine what those riders meant. However, you will consider them solely for the purpose of their bearing upon the testimony of Mr. Nunnely and Mr. Goodwin, touching the proposition as to whether or not Mr. Goodwin communicated to Mr. Nunnely at any time when he was getting the insurance

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that he owned the property otherwise than unconditionally and solely. That is, you may consider the riders only for that purpose."

We think the charge of the court as given latterly fairly covered that question. It was a question of veracity between the insured and the agent as to whether the insured had communicated to the agent the state of his title prior to the issuing of the policy. The language of the riders was submitted to the consideration of the jury to aid them in determining whether the insured or the agent had testified truthfully in regard to it. This submission very clearly placed before the jury the use they should make of the riders, and, if defendant's counsel had desired anything further in connection with it, they should have so requested the court at that time.

Fifth. Defendant claims that the verdict was due to the natural prejudices of the jury against a foreign corporation, and especially against a foreign insurance company, and that the remarks of plaintiff's counsel during the trial, and his argument to the jury, intensified these natural prejudices. We do not think that this court should assume without proof that the jury were prejudiced against the defendant because it was a corporation, or because it was a foreign insurance corporation. The objectionable remarks and argument of counsel complained of were mostly of a personal nature directed to defendant's counsel, and were not in every instance pertinent or courteous, but it would be going too far to assume that they influenced the verdict which the jury returned.

The judgment of the trial court is affirmed.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

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PEOPLE, *ex rel.* ATTORNEY GENERAL, *v.* GALBRAITH.

1. PUBLIC OFFICERS—QUALIFICATIONS—NURSES—BOARD OF REGISTRATION.

A member of the board of registration of nurses, under Act No. 319, Pub. Acts 1909, must have five years' experience as a professional nurse, which qualification is not met by experience gained at intervals before her graduation as a trained nurse while engaged in teaching school.

2. SAME—GOVERNOR—APPOINTING POWER.

The statute having prescribed the qualifications necessary to authorize an appointment, the governor is limited to the appointment of persons possessing them, and the appointment of an ineligible person is a nullity.

Quo warranto proceedings by the people of the State of Michigan, on the relation of John E. Bird, attorney general, against Alfreda Maude Galbraith to try the right of respondent to the office of member of the board of registration of nurses. Submitted June 20, 1910. (Docket No. 101.) Judgment of ouster entered September 28, 1910.

John E. Bird, Attorney General (*Crane & Norris*, of counsel), for relator.

Homer H. Quay, for respondent.

BLAIR, J. Information in the nature of quo warranto to test the right of respondent to hold the office of member of the board of registration of nurses provided for by Act No. 319, Pub. Acts 1909. Section 1 of the act prescribes the following qualifications for appointees:

"Such appointees shall be chosen from the actual residents of this State, and, except the registered physician, from nurses who have graduated from reputable training schools, giving at least a two years' course of training, served in hospitals of good standing, and who have had five years' experience in nursing."

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It is conceded that respondent was, at the time of her appointment, of proper age, an actual resident of this State, and a graduate of a reputable training school giving at least a two years' course of training. Counsel disagree as to whether she possessed the other required qualifications. The facts are agreed upon and present the following statement as to respondent's experience in nursing:

"That on the 26th day of July, in the year 1906, the respondent was admitted to and entered the said training school for nurses, and continued in said training school until the 29th day of January, in the year 1909. That after her graduation from said high school, and prior to her admission and entrance to said training school for nurses on the 26th day of July, 1906, teaching school had been the respondent's principal occupation, and she had never been in any training school for nurses nor employed in any hospital or asylum prior to July 26, 1906, but she had done considerable gratuitous nursing for regular reputable physicians in Cheboygan, Michigan, at occasional intervals of her school work, such intervals extending over a period of three years prior to her entering said Butterworth Training School. Said physicians considered her a practical nurse. The schools of Cheboygan, in which she was a teacher during said three years, were in session during the years aforesaid for a period of 40 weeks in each year. * * * That the principal occupation of the said respondent from and after the 29th day of January, in the year 1909, to the date of this stipulation, has been nursing. That the respondent was appointed a member of the State board of registration of nurses on September 8, 1909, by the governor of the State of Michigan. That the respondent filed her oath of office and qualified as a member of the State board of registration of nurses September 14, 1909."

We are of the opinion that the five years' experience specified in the act as one of the qualifications for appointment on the board means an experience gained as a professional nurse, and that the occasional services performed by respondent during intervals in her regular profession as a teacher are not to be considered as any part of the required term. It follows that respondent was not eligible to appointment, and is unlawfully holding her office,

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unless, as suggested by counsel for respondent, "Under the statute the governor of the State of Michigan is made the sole judge as to the qualifications of the applicant." We do not regard this suggestion as well founded. The statute having prescribed the qualifications necessary to authorize an appointment, the appointing power is limited to the appointment of such persons as actually possess those qualifications, and the appointment of an ineligible person is a nullity. 29 Cyc. p. 1374, subd. 5, and cases cited in note 5.

A judgment of ouster is ordered.

OSTRANDER, MOORE, MCALVAY, and STONE, JJ., concurred.

ANN ARBOR RAILROAD CO. v. MICHIGAN RAILROAD COMMISSION.

RAILROADS — MICHIGAN RAILROAD COMMISSION — STATUTES — CONSTITUTIONAL LAW — INTERSTATE COMMERCE.

Rules promulgated by the Michigan Railroad Commission, establishing and enforcing demurrage rates, must be limited to commerce within the State, since section 8 of Act No. 300, Pub. Acts 1909, limits the authority of the commission to the regulation of transportation within the State of Michigan.

Appeal from Wayne; Donovan, J. Submitted June 20, 1910. (Docket No. 87.) Decided September 28, 1910.

Bill by the Ann Arbor Railroad Company and others against the Michigan Railroad Commission to enjoin the

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enforcement of certain rules. From an order sustaining a demurrer to the bill, complainants appeal. Reversed.

Orla B. Taylor and *Charles F. Delbridge* (*Henry Russel*, *O. E. Butterfield*, *B. S. Warren*, *Harrison Geer*, *L. C. Stanley*, *Seward L. Merriam* and *James McNamara*, of counsel), for complainants.

John E. Bird, Attorney General, and *Hal H. Smith* (*Beaumont*, *Smith & Harris*, of counsel), for defendant.

BLAIR, J. On January 1, 1909, the railroads of the lower peninsula of Michigan, which are members of the Michigan Car Demurrage Supervising Bureau, promulgated and placed in force a set of demurrage rules. These rules were filed by each railroad with the Interstate Commerce Commission. During the year 1909 the National Association of Railroad Commissioners, composed of the railroad commissioners of the several States, and the Interstate Commerce Commission, had under consideration a proposed set of demurrage rules intended to be effective throughout the United States. These rules were finally adopted by the Association of Railroad Commissioners by majority vote, and were indorsed on December 18, 1909, by the Interstate Commerce Commission. They have since been adopted and filed by the various railroads as effective in most of the States, and the railroad commissions of many of the States have also adopted them.

The complainant railroads in this case decided to adopt these rules as the demurrage rules upon their various lines of railroad in the State of Michigan, and announced to shippers that they would become effective May 1, 1910, and each railroad has filed the rules with the Interstate Commerce Commission. On February 3, 1910, the Michigan Railroad Commission, which did not agree with the National Association of Railroad Commissioners and the Interstate Commerce Commission, but felt that rules more advantageous to the shippers of Michigan should be adopted, promulgated another set of demurrage rules, and

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ordered that the same become effective on March 1, 1910. These rules apply to the loading and unloading of cars coming from or going to points in other States as well as to those whose travel is within the State. They were promulgated in the form of an order in a proceeding before the Commission commenced June 13, 1908, by the Michigan Manufacturers' Association against the railroads which are complainants in this case, and in which no decision was made until after the adoption of the rules by the National Association of Railroad Commissioners. On March 1, 1910, complainants filed the bill of complaint in this cause, praying that the Michigan Railroad Commission be restrained from enforcing the last mentioned rules as to interstate commerce for the following reasons:

"(*a*) By the express terms of the act, under which said defendant exists, its jurisdiction, power, and authority are limited to the transportation of property between points within the State of Michigan and to the receiving, switching, delivering, storing, and handling of such property, and to all charges connected therewith, including icing and mileage charges.

"(*b*) The legislature of the State of Michigan has never conferred, nor attempted to confer, upon the defendant jurisdiction, power and authority to promulgate and enforce demurrage rules as to interstate commerce, and property and cars in such commerce.

"(*c*) The legislature of the State of Michigan has never adopted, nor attempted to adopt, demurrage rules or laws relative to interstate commerce and property and cars in such commerce, and is without power so to do.

"(*d*) Interstate commerce begins as a matter of law when the loading of the property intended for interstate shipment into the car is commenced, and does not end until the actual removal of the property from the car at final destination, and is during said entire period within the jurisdiction of congress and the Interstate Commerce Commission, and entirely beyond the jurisdiction of the legislature of the State of Michigan.

"(*e*) The legislature of the State of Michigan was and is without authority to enact section 8 of said Act No. 300, Pub. Acts 1909, which provides that the defendant Commission shall have power to fix a reasonable *per diem*

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demurrage to be paid for the detention of cars by shippers or consignees, and said provision of said act is unconstitutional and void.

"(*f*) If said act and paragraph 8 thereof aforesaid or either of them are intended to apply to interstate commerce as defined by the acts of congress aforesaid, said act and said paragraph are in violation of paragraph 3 of section 8 of article 1 of the Constitution of the United States.

"(*g*) The Interstate Commerce Commission of the United States, which exists under and by virtue of act of congress of February 4, 1887, as amended, has complete, sole, and exclusive jurisdiction, power and authority over the subject of demurrage upon interstate commerce as defined in said act, and upon property and cars in such interstate commerce, and the defendant has no jurisdiction, power, or authority with reference thereto.

"(*h*) Any demurrage rules whatsoever adopted and promulgated by the defendant Commission which constitute a burden upon or a regulation of commerce with foreign nations and among the several States are void for the reason that said Commission has no jurisdiction, power, or authority to adopt or enforce the same.

"(*i*) The demurrage rules promulgated by the defenddant (Exhibit C), if enforced, will constitute a burden upon, and regulation of, interstate commerce."

The Railroad Commission filed a demurrer to said bill of complaint, and the issue as to its power and authority is clearly framed. The reasons set forth in the demurrer are as follows:

"(*a*) There is no equity in the bill contained.

"(*b*) The service for which the complainants make the demurrage charge, so called, and to which the demurrage rules, so called, apply, is intrastate commerce, and not interstate commerce, and therefore within the sole jurisdiction of the Michigan Railroad Commission.

"(*c*) The service for which the demurrage charge is made and to which the demurrage rules apply arises, in the case of an interstate shipment, either before the car becomes an instrumentality of interstate commerce or after it has ceased to be such instrumentality, and is therefore an intrastate service, and its regulation is within

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the sole jurisdiction of the Michigan Railroad Commission.

"(*d*) Demurrage rules do not directly affect interstate commerce, since they relate to matters arising either before the interstate movement begins or after it ceases.

"(*e*) Demurrage rules, if they at all affect interstate commerce, do so only indirectly, and may, therefore, in the absence of express action by the congress of the United States, be prescribed by the State authority.

"(*f*) The congress of the United States neither through itself nor through the Interstate Commerce Commission has prescribed rules governing demurrage and demurrage charges. The recommendations of the Interstate Commerce Commission are only advisory.

"(*g*) The rules promulgated by the Michigan Railroad Commission are regulations conducive to the comfort and convenience of the citizens of the State, and therefore within the power of the Michigan Railroad Commission to make.

"(*h*) The rules promulgated by the Michigan Railroad Commission do not burden interstate commerce, but, even if it can be said that they indirectly burden it, they relate to matters merely incidental to interstate commerce and within the power of the State to regulate, at least in the absence of action by congress.

"(*i*) The act creating the Michigan Railroad Commission, in express terms and by implication, empowers that commission to make and prescribe reasonable demurrage rules, and such act and such provisions are valid and constitutional, and not in conflict with the Constitution of the United States or any part thereof.

"(*j*) The rules prescribed by the Michigan Railroad Commission are reasonable rules. Their natural and reasonable effect will be to assist the movement of interstate commerce and not to burden or hamper it."

The circuit court sustained the demurrer and complainants appeal to this court.

The power to promulgate demurrage rules and the duty to do so is expressly conferred and enjoined upon the defendant by section 8 of Act No. 300 of the Public Acts of 1909, entitled:

"An act to define and regulate common carriers and the receiving, transportation and delivery of persons and prop-

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erty, prevent the imposition of unreasonable rates, prevent unjust discrimination, insure adequate service, create the Michigan Railroad Commission, define the powers and duties thereof and to prescribe penalties for violation hereof."

Section 3 of the act defines and interprets the terms used in and the scope of the act. Subdivision "*d*" of the section reads as follows:

"The provisions of this act shall apply to the transportation of passengers and property between points within this State, and to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing and mileage charges."

It is apparent, therefore, that, by the terms of the act creating the defendant and defining its powers, its authority to promulgate demurrage rules is expressly limited to cases where the property has been or is to be transported "between points within this State." It becomes unnecessary, therefore, to consider the power of the legislature to grant the authority claimed for the defendant or the other interesting questions discussed in the briefs of counsel, since the limitations of the act creating it negative any authority on the part of defendant to establish and enforce demurrage rules where the transportation is interstate. It follows that defendant's demurrage rules must be limited in their application to intrastate transportation.

The order sustaining the demurrer is reversed, and a decree may be entered in favor of complainants in accordance with this opinion, but without costs.

OSTRANDER, HOOKER, MCALVAY, and STONE, JJ., concurred.

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INTERNATIONAL HARVESTER CO. OF AMERICA v. EATON CIRCUIT JUDGE.

1. CONTRACTS — PUBLIC POLICY — RESTRAINT OF TRADE — TRUSTS AND MONOPOLIES.
   Under the common law it is no defense to an action upon a contract which is in itself legal and valid, that the plaintiff is a trust, monopoly, or combination in restraint of trade.

2. SAME—STATUTES—ACTIONS BY TRUST OR MONOPOLY.
   The defense that a foreign corporation is an illegal combination or trust, within the meaning of Act No. 255, Pub. Acts 1899, or Act No. 329, Pub. Acts 1905, is not available to a defendant in an action of assumpsit for money had and received for the benefit of the plaintiff, in a transaction untainted by illegality.

3. CORPORATIONS—MONOPOLY—DEFENSES TO ACTIONS—DE JURE CORPORATION.
   Where the articles of association of a corporation state a purpose for which the statute authorizes a corporation to be formed, then, if other requirements of the law are complied with, it is not only a corporation *de facto* but is a corporation *de jure*, whose organization cannot be attacked or dissolved except for misuser; and then, only by a direct proceeding by the State to test its right.

Mandamus by the International Harvester Company of America to compel Clement Smith, circuit judge of Eaton county, to vacate an order requiring relator to produce certain books and papers. Submitted June 24, 1910. (Calendar No. 24,024.) Writ granted September 28, 1910.

Harry H. Partlow and *Thomas, Cummins & Nichols* (*James C. McMath*, of counsel), for relator.

John L. Wright (*Elmer N. Peters*, of counsel), for respondent.

STONE, J. Relator is a corporation organized and exist-

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ing under the laws of Wisconsin. It was first incorporated in 1881 under the name of the Parker-Dennett Harvesting Machine Company, Limited, with a capital stock of $100,000, for the purpose of manufacturing and selling harvesting and other farm machinery. In March, 1882, its name was changed to the Dennett Harvesting Machine Company, Limited. In February, 1883, its capital was increased to $250,000. In December, 1883, it was again increased to $500,000. In November, 1884, the name of the company was changed to the Milwaukee Harvester Company. In April, 1889, the capital stock was increased to $750,000, and in January, 1893, was again increased to $1,000,000, where it has remained ever since. On September 5, 1902, the name of the company was changed to the International Harvester Company of America, which name it now bears. On April 3, 1903, the relator was regularly admitted by the secretary of State of Michigan to carry on its business in this State, in accordance with the provisions of Act No. 206 of the Public Acts of 1901, and, in pursuance of the authority granted it as aforesaid, has conducted its business of selling agricultural implements in this State since that time, and has invested large sums of money in real estate, and warehouses necessary and incident to its business aforesaid. Since its admission to do business in this State, it claims that it has complied with all the requirements of our foreign corporation laws by regularly filing its annual reports; and this claim is not denied by respondent.

In 1907, in the regular course of its business in this State, the relator appointed Fayette De Puy and John Holmes (a copartnership doing business as De Puy & Holmes) its agents for the sale of its products at Grand Ledge and vicinity. During the continuance of this agency—that is, during the spring and summer months of 1907—the said De Puy & Holmes became indebted to the relator in the claimed sum of about $1,500, a large portion of which was for moneys collected by said De Puy & Holmes as agents of relator, and the remainder was for

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the purchase price of goods sold and delivered to said De Puy & Holmes by relator during the continuance of the agency aforesaid. Most of this indebtedness remaining unpaid, the relator, on November 12, 1909, commenced an action of assumpsit in the circuit court for the county of Eaton, against said De Puy & Holmes to recover the amount owing to it, as above stated. The declaration was on the common counts. Defendant Holmes made no defense, and his default was regularly entered; but defendant De Puy filed a plea of the general issue with notice of two special defenses, viz.:

(1) That the plaintiff, at the time the indebtedness mentioned was created, was a "trust," as defined by the statutes of this State, and hence any contract made by defendant with the plaintiff was null and void, and against public policy. That the said plaintiff is a corporation organized and existing under the laws of the State of Wisconsin. That the purpose of said corporation is, to wit, the control of the manufacturing of all harvest machinery and other agricultural implements, to carry out restrictions in trade of the said agricultural implements, to limit or reduce the price of said implements, to prevent competition in the manufacture of said implements, to fix the price to the consumer, thereby controlling and establishing the price to the public at large by entering into an agreement whereby it has bound itself with the several harvester companies not to sell any of their or its manufactured products below a certain standard, by them and the plaintiff fixed. That the plaintiff is a pool and combine, whereby the interest of all, or nearly all, of the great harvester companies of the world are united, and the interest of all such companies is fixed by the said plaintiff. And that the plaintiff thereby fixes and controls the price of their products.

(2) That the plaintiff had never filed a copy of its articles of incorporation with the secretary of State of the State of Michigan, or paid the lawful fees by it to be paid, before doing business in this State, and hence any contract made by defendant with the plaintiff was null and void, and could not be enforced.

We note in passing that the second allegation of the notice is in direct conflict with the relator's petition for

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mandamus (Petition, par. 2), which paragraph of petition is admitted to be true, in the answer of respondent.

After issue was thus joined, defendant De Puy filed a petition under Circuit Court Rules 50–57 (124 Mich. xxxviii [87 N. W. vi]), first reciting in substance the defenses above mentioned, and then alleging that it was necessary, to enable him to prepare for trial, that the books, records, documents, and papers of the plaintiff (relator) showing the names of its stockholders, the amount of stock held by each, the names of its officers, the total amount of property in Michigan from 1903 to 1909, the total amount of property owned by it from 1903 to 1909, the total amount of business done by it from 1903 to 1909, the total amount of business done by it in Michigan from 1903 to 1909, also the number and location of factories, also the records of its stockholders' and directors' meetings from 1903 to 1909, or sworn copies thereof, be produced, and deposited with the clerk of said court, and that all proceedings in the suit of the plaintiff be stayed until such books, records, etc., were produced as prayed for. The petition contained an averment, upon information and belief (in addition to the special defenses set up under the plea of the general issue), that plaintiff (relator) had increased from time to time the proportion of its capital stock represented by property and business in Michigan, and had not, within 30 days after such increase, filed a statement showing such increase with the secretary of State. We note again the fact that in its petition for mandamus the relator avers that it has in all respects complied with the laws of this State, governing the business of foreign corporations in the State. The answer of respondent does not deny the averment. *Berube* v. *Wheeler*, 128 Mich. 32 (87 N. W. 50); *Barlow* v. *Riker*, 138 Mich. 607 (101 N. W. 820). After hearing the said petition of defendant De Puy, the respondent granted the order prayed for, whereupon the relator formally moved the respondent to vacate such order, which motion of relator was denied. Relator filed its pe-

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tition in this court for a writ of mandamus to compel the respondent to vacate and set aside the order above mentioned; an order to show cause was issued and served; and respondent has made a return substantially admitting all of the material averments of relator's petition.

At the outset it may be well for us to distinguish this case from the several cases in this court cited by respondent's counsel, to the proposition that contracts of an unlicensed foreign corporation made in this State are illegal, and that such corporations will be denied the aid of our courts in enforcing such contracts. Most of the cases cited are insurance cases, in which the contracts were expressly prohibited, and some of them are cases of foreign mercantile corporations, in which the statute expressly declared that such contracts should be void. Such corporations have sometimes been spoken of as having no legal existence here, and as having no standing in our courts. Among such cases are the following: *Richardson* v. *Buhl*, 77 Mich. 632 (43 N. W. 1102, 6 L. R. A. 457); *Seamans* v. *Temple Co.*, 105 Mich. 400 (63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457); *People's Mut. Benefit Society* v. *Lester*, 105 Mich. 716 (63 N. W. 977); *Swing* v. *Weston Lumber Co.*, 140 Mich. 344 (103 N. W. 816); *Swing* v. *Cameron*, 145 Mich. 175 (108 N. W. 506, 9 L. R. A. [N. S.] 417).

It was, however, held in *People* v. *Hawkins*, 106 Mich. 479 (64 N. W. 736), that an agent of a foreign corporation could not defend a charge of embezzlement, upon the ground that the corporation was prohibited from doing business in this State, by reason of noncompliance with the statutory conditions.

We are here dealing with a corporation that is alleged to be a "trust" or monopoly; one, however, which, as appears by its articles of incorporation, was lawfully organized for a legitimate purpose and business, under the laws of Wisconsin. It has complied with the laws of this State regulating foreign corporations. It comes into a court of this State, and sues upon an independent collat-

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eral contract, made with defendant, an agent, in this State—a contract in no way tainted with the illegality of the alleged trust or combination, and one not prohibited by our statute. Can the defense here sought to be imposed be maintained? Assuming, as contended, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that the defendant could refuse to pay for goods bought by him under special contract with plaintiff. The illegality of such combination and "trust" would not prevent the plaintiff corporation from selling goods that it obtained even from its constituent companies or either of them. It could pass title by sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of articles or products. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (22 Sup. Ct. 431). This was an action brought upon contract between the parties, which was itself legal and entirely collateral to any illegal combination. It was sought there by special defense to defeat the action by showing that the plaintiff was a "trust" or combination, and the Supreme Court of the United States held that the defense could not be maintained. The court cites *Strait* v. *National Harrow Co.*, 51 Fed. 819, and *Kiff* v. *Youmans*, 86 N. Y. 329 (40 Am. Rep. 543). Justice Harlan said:

"In *National Distilling Co.* v. *Importing Co.*, 86 Wis. 352 (56 N. W. 864, 39 Am. St. Rep. 902), which was an action to recover the price of goods sold and delivered, one of the defenses was that the plaintiff was a member of an illegal 'trust' or combination to interfere with the freedom of trade and commerce. The supreme court of Wisconsin said:

"'The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful

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trust or combination, formed to unlawfully interfere with the freedom of trade and commerce, and in restraint thereof, and to accomplish the ends therein set forth. * * * Conceding, for the purposes of this case, that the trust or combination in question may be illegal, and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called "trust" or "combination," the defendant might voluntarily purchase the goods in question of it at an agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences.'

"That case was cited * * * in *Dennehy* v. *McNulta*, 86 Fed. 825, 827, 829, 30 C. C. A. 422 (41 L. R. A. 609). * * *

"It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it; as in *Embrey* v. *Jemison*, 131 U. S. 336, 348 (9 Sup. Ct. 776). That was an action upon a promissory note given in execution of a contract for the purchase of 'future delivery' cotton, neither the purchase nor delivery of the actual cotton being contemplated by the parties, but the settlement in respect to which was to be on the basis of the 'difference' between the contract price and the market price of cotton futures, according to the fluctuations in the market. The contract was held to be a wagering contract, and therefore illegal and void."

See, also, *Miller* v. *Ammon*, 145 U. S. 421 (12 Sup.

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Ct. 884); *McMullen* v. *Hoffman*, 174 U. S. 639, 654 (19 Sup. Ct. 839).

Assuming therefore that relator is a "trust" or monopoly as defined by our laws, its independent or collateral contracts, such as is sued on in this case, are just as valid and enforceable as are the contracts of any other person or corporation, unless some statute has changed the rule of the common law in that respect. The only statutes touching the matter are Act No. 255, Pub. Acts 1899, and Act No. 329, Pub. Acts 1905. Subdivision 5 of section 1 and sections 2, 3, and 8 of the act of 1899 are here referred to. Act No. 329 of 1905 is entitled:

"An act relative to agreements, contracts and combinations in restraint of trade or commerce."

It is declared to be supplementary to, and declaratory of, and in addition to, Act No. 255, Pub. Acts 1899. Its first five sections are material here, and are referred to. Neither of the acts undertakes to prohibit or forbid the making of such contracts as the one involved in this suit. It is evident that by the language of section 8 of the act of 1899, and section 5 of the act of 1905, above referred to, the legislature did not leave to inference or implication the illegality of the particular contracts which it was dealing with.

The language of Justice Harlan, in *Connolly* v. *Union Sewer Pipe Co.*, *supra*, where he deals with the special defense in that case based upon the "Sherman anti-trust act," is pertinent here:

"The special defense based upon Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], was also properly rejected. * * * Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of congress, then all those, whether persons, corporations, or associations, directly connected therewith, be-

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came subject to the penalties prescribed by congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold; such property not being at the time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with this contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of congress; for congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement of the combination referred to, and this is not an action to enforce the terms of such arrangement. * * * In the case of *The Charles E. Wisewall*, 74 Fed. 802, which was a libel *in rem* by certain tug owners against a steam dredge to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the services thus rendered upon the ground that the tug owners were members of an association which was illegal and void under the Sherman act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said:

"'He (the claimant) should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services, and having accepted the benefit thereof, he should pay. * * * An agreement by the tug Mayflower to tow the dredge Wisewall, for a reasonable sum, from Albany to Troy, is not void because the Mayflower is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market price because the vendor and other tailors of that city had combined to keep up prices.'

"Nor can the defendants refuse to pay for what they bought upon the ground that the seventh section of the

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Sherman act gives the right to any person 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful' by the act to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination. * * * If the act of congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision."

Chicago Wall Paper Mills v. *General Paper Co.*, 147 Fed. 491, 78 C. C. A. 607. It was held there that a contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a "trust" or monopoly organized in violation of law, either Federal or State; the contract of sale being collateral and having no direct relation to the unlawful scheme or combination. The following cases are cited: *Hopkins* v. *U. S.*, 171 U. S. 578 (19 Sup. Ct. 40); *Anderson* v. *U. S.*, 171 U. S. 604 (19 Sup. Ct. 50); *Star Brewery of Chicago* v. *U. S. Breweries Co.*, 121 Fed. 713, 58 C. C. A. 133; *Harrison* v. *Refining Co.*, 116 Fed. 304, 53 C. C. A. 484 (58 L. R. A. 915). This case was in the seventh circuit. Opinion by Jenkins, C. J., and concurred in by Grosscup and Humphrey. The opinion commences with the following language:

"The objection that the appellee is an illegal trust or monopoly condemned by the law of the State of Illinois, and so declared by the supreme court of that State, cannot be sustained. We have held, in the case of an injurious combination of the nature here asserted, that *the rem-*

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edy is by direct proceedings; that with respect to a contract which is independent of the illegal combination, and is merely incident to other and innocent purposes, one who voluntarily and knowingly deals with parties so combined cannot on the one hand take the benefit of his bargain, and on the other hand defend against the contract on the ground of the illegality of the combination. *Dennehy* v. *McNulta*, 30 C. C. A. 422, 86 Fed. 825 (41 L. R. A. 609). See, also, *National Folding Box & Paper Co.* v. *Robertson*, 99 Fed. 985."

Reference is also made to *Connolly* v. *Sewer Pipe Co.*, *supra*. *Hadley-Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 Fed. 243, 74 C. C. A. 462, opinion by Van Devanter, C. J., concurred in by Judges Hook and Lochren. The Highland Glass Company, a Pennsylvania corporation, engaged in manufacturing glass in that State, received and accepted an order for the manufacture and delivery of glass from the Hadley-Dean Glass Company, a Missouri corporation. There was some evidence tending to show that at the time of making the contract the plaintiff and others, not including the defendant, were in an unlawful combination to stifle competition to the sale of glass, and to arbitrarily control its price, and because of this it was contended that in directing a verdict for the plaintiff the court failed to give effect to the anti-trust statute of Missouri, and to the anti-trust legislation of congress. After holding that, as to the said statute, it could have no application to the contract under consideration without impinging upon the exclusive authority of congress to regulate commerce among the several States, the court proceeds to consider the "Sherman anti-trust act," and quotes therefrom, and proceeds in the following language:

"That it does not render illegal or prevent a recovery on this contract is shown by *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (22 Sup. Ct. 431)."

The only provision in either the act of 1899 or 1905 which gives any force to the claim that the collateral con-

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tracts of "trusts" and monopolies are void and unenforceable in this State, is that contained in section 3 of the act of 1899, which in substance provides that "every foreign corporation violating any of the provisions of this act is hereby denied the right, and prohibited from doing business in this State; and it shall be the duty of the attorney general to enforce this provision by bringing proper proceedings in quo warranto," and the provision of section 4, act of 1905. There is not a word in either statute that gives a purchaser of goods the right to plead these statutes as a defense. As we have already indicated, it is not contended but that the relator is duly and regularly organized as a corporation under the laws of Wisconsin, and that its articles of incorporation state a purpose entirely lawful and legitimate. The notice of special defense, in effect and substance, is that, although the relator was duly and legally incorporated under the laws of Wisconsin authorizing the formation of corporations for a perfectly legitimate and lawful purpose, and although its articles of incorporation state a purpose in compliance with such laws, nevertheless the *real purpose* of the incorporation was unlawful, viz., to carry out restrictions in trade and commerce, contrary to the common and statute law. In short, to create a "trust" or monopoly.

If the articles of the relator state a purpose for which the statute authorizes a corporation to be formed, then, if other requirements of the law are compiled with, it is not only a corporation *de facto*, but it is a corporation *de jure*. In such a case the illegality of its organization cannot be attacked at all, and it can only be shown that the corporation is guilty of a *misuser* of its corporate franchises by attempting, under the guise of a legal corporate existence, to conduct a business not authorized by its charter, or in a manner contrary to law, or some principle of public policy; and this by a direct proceeding to test its right. *Attorney General* v. *Lorman*, 59 Mich. 162 (26 N. W. 311, 60 Am. Rep. 287); *Detroit Driving Club* v. *Fitzgerald*, 109 Mich. 675 (67 N. W. 899); 2 Morawetz

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on Private Corporations (2d Ed.), § 758; *Blair* v. *City of Chicago*, 201 U. S. 450 (26 Sup. Ct. 427). The rule that, where a corporation is incompetent by its charter to do an act, a private party cannot raise the question, but the sovereign alone can object, in a direct proceeding instituted for that purpose, applies here. This rule has frequently been applied to *ultra vires* acts of national banks. *National Bank* v. *Matthews*, 98 U. S. 621.

In conclusion, we quote the following from 10 Cyc. p. 256:

"This brings us to the doctrine, founded in public policy and convenience and supported by an almost unanimous consensus of judicial opinion, which is that rightfulness of the existence of a body claiming to act, and in fact acting in the face of the State, as a corporation, cannot be litigated in actions between private individuals, or between private individuals and the assumed corporation, but that the rightfulness of the existence of the corporation can be questioned only by the State; in other words, that the question of the rightful existence of the corporation cannot be raised in a collateral proceeding."

More than 100 cases are cited in the note from 30 States of the Union and United States Supreme Court. The Michigan cases are *Montgomery* v. *Merrill*, 18 Mich. 338; *Toledo, etc., R. Co.* v. *Johnson*, 49 Mich. 148 (13 N. W. 492); *Wyandotte Electric Light Co.* v. *City of Wyandotte*, 124 Mich. 43 (82 N. W. 821).

It seems very clear to us that persons who buy goods or receive services from members of a combination cannot interpose the defense that the plaintiff is a party to an independent combination in restraint of trade in no way affecting the contract sued upon, unless, as in some few States, there is an explicit statutory provision creating such a defense; and that there is no such statutory provision in Michigan.

We are of opinion that the claimed defense is not available to, and cannot be maintained by, the defendant in the pending suit.

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It follows that the order made by the respondent should be vacated, and the writ of mandamus will issue as prayed for in relator's petition, with costs to the relator against the defendant De Puy.

BIRD, C. J., and OSTRANDER, HOOKER, and BLAIR, JJ., concurred.

THEISEN *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—HIGHWAYS AND STREETS.

   Knowledge of a person injured at a street railway intersection, that cars were required by ordinance and were accustomed to stop before crossing the intersection, and his reliance on the fact, have a material bearing on the question of contributory negligence in driving a hose cart across in front of the car, which he saw approaching some distance from the street intersection.[1]

2. SAME—CONTRIBUTORY NEGLIGENCE—FIRE DEPARTMENT.

   Such reliance on the ordinance and custom, where the city charter also gave the fire apparatus the right of way over other vehicles, made the question of contributory negligence a question of fact.

3. SAME.

   If the driver had his horses under control and attempted to cross in front of a car which he saw from 40 to 70 feet away from the usual stopping place, it was for the jury to say whether he was justified in relying on the motorman's performance of his duty to stop the car.

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[1] As to liability of street railway company for injuries caused by collision with fire apparatus, see note to *Dole* v. *New Orleans R. & L. Co.* (La.), 19 L. R. A. (N. S.) 623.

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Error to Wayne; Hosmer, J. Submitted June 23, 1910. (Docket No. 137.) Decided September 28, 1910.

Case by Anthony Theisen against the Detroit United Railway for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Brennan, Donnelly & Van De Mark (*A. B. Hall*, of counsel), for appellant.

O'Neil & Command, for appellee.

BLAIR, J. Plaintiff, while driving a hose cart to a fire in the line of his duty as an employé of the fire department, was injured in a collision with one of defendant's cars at the intersection of Brush and Adams streets in the city of Detroit. Defendant was operating a double-track line on Adams avenue and a single-track line on Brush street. Plaintiff was proceeding east on Adams avenue at a speed of about 10 miles an hour, requiring a space of 150 feet within which to stop his horses. There is a building at the northwest corner of Brush and Adams extending out to the sidewalk lines of both streets. The city charter gives to the fire department vehicles the right of way over all other vehicles except the United States mail vehicles. The ordinances of the city of Detroit require street railway cars approaching an intersecting street occupied by other tracks to come to a stop at least 20 feet in front of the intersecting tracks. The hose cart proceeded without slackening speed until it approached within 40 feet of the track on Brush street, when the plaintiff discovered a car approaching from the north 40 to 70 feet away and proceeding, according to his testimony, at a speed of 12 miles an hour. There is a conflict of testimony as to whether the car stopped before crossing the tracks on Adams avenue, the plaintiff and his witnesses claiming that the car did not stop, and the defendant's witnesses claiming that it did. Upon seeing the car, the plaintiff urged his horses across the tracks, and the hose

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cart was either struck by the car or struck the car in such a manner as to completely turn over the hose cart and throw it on the sidewalk at the southeast corner of Brush and Adams.

Defendant's motorman testified:

"To my best judgment I stopped about 25 feet north of the Adams avenue track that night. The front part of the car I was on was back of the building line of the terrace on the corner about 8 or 9 feet. When I stopped at the corner, I could see west on Adams avenue 150 or 200 feet. At that time the car just made a momentary stop, and then went right on again. * * *

"*Q.* When you got to the north curbstone on Adams avenue, you saw the hose cart?

"*A.* I noticed it then; yes, sir. * * *

"*Q.* Then you say that you had only gone 13 feet, about 13 feet when you saw the hose cart, and still you went 23 feet before you stopped the car?

"*A.* About that.

"*Q.* It took you 23 feet to stop the car in when you had only been going 13 feet from a full stop, is that right? Now, when you passed the line of the terrace, did you make any effort to look in a westerly direction to see if any vehicle was coming?

"*A.* I looked when I made the stop. I don't know as I looked when I passed that certain point there."

Capt. Courtney testified:

"Why, we were about, I should judge, about 40 feet from the Brush street track on Adams, proceeding east, when I noticed the car coming south. I presume it was up maybe about 75 feet from the crosswalk of Adams avenue on Brush, coming south.

"*Q.* Where was the hose cart situated on Adams with reference to the track?

"*A.* Well, we were up on right-hand side of the street. We were practically at the south track on the south side of the street. There is a double track along there on Adams avenue. * * * The cars usually stop before they cross that intersection. The car was going, in my estimation, 30 miles an hour at the time they struck the hose wagon. It was going faster than we were. The distance between the nearest track and the curb would be about 15 or 16 feet."

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The questions for our consideration, as stated by counsel for defendant and appellant in their brief, are as follows:

"While there are 15 assignments of error in the record, the defendant and appellant relies for reversal upon the error of the trial judge in his failure to direct a verdict at the close of the plaintiff's case, and upon the theory of his charge that because an ordinance of the city required the street cars to stop at least 20 feet in front of intersecting tracks, and because an ordinance of the city of Detroit gave the right of way to fire engines, that the driver of a hose cart could approach a street railway track at a point where it intersects with other tracks at a rate of speed of 10 miles an hour and without having his horses under control so that he could stop them within 150 feet. It was the theory of the trial judge that, while the driver of a hose cart approaching a street railway track on a street where there was no intersecting track would be required to obey the rule laid down by this court governing all persons approaching a street car track, this rule would not be applicable where the hose cart was proceeding along a street containing a car track and where the driver relied upon the ordinance requiring all street cars to stop at least 20 feet before intersecting tracks."

It appeared from plaintiff's testimony that he was familiar with the ordinance requiring the cars to stop and with the custom of the defendant's employés to obey the ordinance and bring their cars to a stop, and that he relied upon their performing such duty in approaching this crossing. This knowledge and reliance of the plaintiff has a distinct bearing upon the question of his contributory negligence. *McKernan* v. *Railway Co.*, 138 Mich. 520 (101 N. W. 812, 68 L. R. A. 347). And these facts make this case, so far as contributory negligence is concerned, a stronger case for the plaintiff than the case of *Garrity* v. *Railway Co.*, 112 Mich. 369 (70 N. W. 1018, 37 L. R. A. 529), where the cars were required to and did cross the street before coming to a stop.

Furthermore, if the driver saw the car from 40 to 70 feet north of the usual stopping place, we cannot say, as a matter of law, he might not have been justified in at-

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tempting to cross, if his horses were under control, in reliance upon the motorman's performance of his duty. *Garrity* v. *Railway Co.*, *supra*.

We are, therefore, of the opinion that the question of plaintiff's contributory negligence was for the jury, and that the circuit judge did not err in refusing to direct a verdict for defendant.

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

IMPERIAL CURTAIN CO. *v.* JACOB.

1. CORPORATIONS—INCORPORATION—FOREIGN CORPORATIONS—EVIDENCE.
   That a plaintiff is a corporation and is doing business under the name of the "Imperial Curtain Company," is *prima facie* evidence of its due incorporation, in an action of assumpsit by a foreign corporation. 8 Comp. Laws, § 10194.

2. SAME—STATUTES.
   The statute applies to both foreign and domestic corporations.

3. SAME—PLEA—PROOF OF INCORPORATION.
   The plea of the general issue is an admission that plaintiff, suing as a corporation, is properly incorporated.

4. SAME—PLEADING—INCORPORATION.
   It was unnecessary to allege the incorporation of plaintiff, a foreign corporation, under any particular State law.

5. CONSTITUTIONAL LAW — INTERSTATE COMMERCE — WORDS AND PHRASES—DEFINITION.
   Interstate commerce is a term of largest import; it comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange

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of commodities between citizens of one country and the citizens or subjects of other countries, and between citizens of different States.

6. SAME—INTERSTATE COMMERCE—FOREIGN CORPORATIONS.
Placing a printed advertisement, prepared in and shipped from one State, on the theater curtain in a city of another, under a contract to maintain and display the advertisement to audiences in the theater, for a period of three years, where the contract was negotiated in the city in which the advertisement was displayed and approved in the foreign State, is not interstate commerce, but business of a local character.

7. CORPORATIONS—FOREIGN CORPORATIONS—LICENSE TO TRANSACT BUSINESS.
A foreign corporation cannot recover for such local business without being authorized to do business in Michigan, under Act No. 206, Pub Acts 1901, as amended by Act No. 84, Pub. Acts 1903, and Act No. 310, Pub. Acts 1907.

Error to Wayne; Donovan, J. Submitted June 23, 1910. (Docket No. 131.) Decided September 28, 1910.

Assumpsit by the Imperial Curtain Company against Ben. B. Jacob and Sol. Sallan, copartners as the Reliable Pawnbrokers, on a contract for advertising. A judgment for plaintiff on a verdict directed by the court is reviewed by defendants on writ of error. Reversed, and no new trial ordered.

Friedman & Smilansky, for appellants.

George W. Bates, for appellee.

STONE, J. This is an action of assumpsit brought to recover the amount alleged to be due for printing, placing, and maintaining an advertisement by the plaintiff on the street curtain of the Gayety Theater, Detroit. The advertisement was solicited by a traveling agent of the plaintiff on May 5, 1907, who sent the contract to the home office of the plaintiff, in Philadelphia, for approval. The contract was as follows:

"No payments to be made to agents except upon written

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authority. Verbal understandings or agreements will not be recognized.

"IMPERIAL CURTAIN COMPANY,
"737 Walnut Street, Philadelphia.

"In consideration of the Imperial Curtain Company placing our advertisement on the street drop of the Gayety Theater, in the city of Detroit, State of Michigan, for three years from the date of first exhibit of advertisement to an audience, said advertisement to occupy 24x30 inches, we agree to pay to the Imperial Curtain Company the sum of one and fifty one-hundredths dollars ($1.50) per week, payable every four weeks in advance, payments to date from the day said advertisement is first exhibited to an audience in said theater. * * *

"The Imperial Curtain Company is to make a rebate of $1.50 for each entire week the advertisement is not displayed during the life of this contract. In case we do not furnish copy when requested, the Imperial Curtain Company is authorized to make up our copy themselves. We agree to change advertisements twice a year during contract.

"Date: 5/17-07.
"Full name of advertiser:
"RELIABLE PAWNBROKERS,
"Signed by Jacob & Sallan,
"Address 228 Randolph.
"IMPERIAL CURTAIN COMPANY,
"M. B. SCHLESINGER, Solicitor."

The contract was approved by the plaintiff, and the defendants were notified by letter of May 21, 1907, as follows:

"May 21, 1907.

"RELIABLE PAWNBROKERS,
"228 Randolph St., Detroit, Mich.

"*Gentlemen:* We are in receipt of your contract obtained by our Mr. Schlesinger to place your advertisement on the advertising drop of the Gayety Theater, Detroit, for three years from date of first exhibit. Kindly accept our thanks. We hope you will find it of great benefit to you.

"Yours very truly,
"IMPERIAL CURTAIN CO.,
"H. E. NAEGELE, Sec'y."

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The agent of the plaintiff prepared a copy of the advertisement, and at the time the contract was sent to the home office in Philadelphia a copy of the advertisement accompanied it. This was subsequently printed in Philadelphia and sent to the Gayety Theater by express, and was placed on the drop curtain of the theater by pasting it thereon, and the same was there maintained and displayed continuously during the theatrical seasons of 1907 and 1908. The suit originated in justice's court, where the plaintiff had judgment. The defendants appealed to the circuit court, where the circuit judge directed a verdict for the plaintiff. The defendants bring error. The questions argued were raised by exception, and error has been assigned.

The case may be disposed of by considering the following points urged by defendants:

(1) That there was no proof of the due incorporation of the plaintiff under the law of any State.

(2) That, as a foreign corporation, it is required to file articles of incorporation here, in order lawfully to do business in this State; and this involves the question whether this business was interstate commerce, or was business of a purely local character.

1. The undisputed evidence shows that the order or contract was addressed to "Imperial Curtain Company, 737 Walnut Street, Philadelphia." The summons named "The Imperial Curtain Company, a corporation." The plea was the general issue. It seems to us that under the statute (section 10194, 3 Comp. Laws) the fact that the plaintiff was doing business under a certain name was *prima facie* evidence of its due incorporation. There was in the act of the defendants in signing the contract or order evidence of the name and lawful existence of the plaintiff as a corporation, which clearly brings the case under the provisions of the statute above referred to. This statute applies equally to foreign and domestic corporations. As there was no countervailing evidence, this was sufficient. *Lake Superior Bldg. Co.* v. *Thompson*, 32

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Mich. 293. We agree with plaintiff's contention that, under the plea of the general issue, the incorporation of the plaintiff was practically admitted. *Garton* v. *Union City Nat. Bank*, 34 Mich. 279; *Wilson Sewing Machine Co.* v. *Spears*, 50 Mich. 534 (15 N. W. 894). Nor was it necessary to allege its incorporation under any particular State law. The objection is purely technical, and without merit.

2. Was this interstate commerce? Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between citizens of one country, and the citizens or subjects of other countries, and between citizens of different States. 7 Cyc. p. 412. Sales of goods by a corporation situated without a State to a resident of the State, even though made through traveling salesmen or agents sent into the State, to be shipped to him into the State, belong to the operations of interstate commerce, and are consequently not subject to a prohibition of the State Constitution, or statute against foreign corporations doing business within the State, nor otherwise subject to prohibition or regulation by the State. 19 Cyc. p. 1230, and note citing cases. The law in force at the time the contract was made was Act No. 206, Pub. Acts 1901, as amended by Act No. 34, Pub. Acts 1903. The act in force at the time the contract was being carried out by the plaintiff was Act No. 310, Pub. Acts 1907. Each of these acts provides that it shall not be construed to prohibit any sale of goods or merchandise which would be protected by the rights of interstate commerce. If the plaintiff did no business of a local character, the case is not within the terms of the statute.

The plaintiff contends that the placing of a printed advertisement prepared in and shipped from Philadelphia on the theater curtain in Detroit amounted to nothing more or less than the delivery and installation of the commodity or the article of merchandise contemplated in the

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contract, and that the contract is not affected by the statute. Counsel for defendants concede that no charge was to be made for placing the advertisement upon the curtain. They claim that the maintaining and displaying of this advertisement to the audiences in the theater, for the period of three years, or any other considerable period, was business of a purely local character, and not interstate commerce. We agree with them in this claim. Even though it should be held that the contract was accepted in Philadelphia, we cannot see how this fact would make any difference in the disposition of the case. The statutes with reference to foreign corporations were not made merely for the purpose of preventing foreign corporations from coming into Michigan and making contracts here, but were passed principally for the purpose of preventing foreign corporations from carrying on their business in this State without subjecting themselves to certain liabilities and obligations. It was the prevention of work within the State that was aimed at, and it was for work and service in this State that this suit was brought, as appears by the record. Counsel for plaintiff concedes that it is a foreign corporation, and the evidence is undisputed that it has not complied with the requirements of our statute relative to the admission of foreign corporations to carry on business in this State. The contract in this case, when properly construed, required the plaintiff to furnish the space, place the advertisement, and maintain and display the same for the period of three years at the Gayety Theater in the city of Detroit, and it was for the recovery of the contract price of two years' maintenance and display of such advertisement that this suit was brought. This part of the contract was to be performed wholly in Michigan, and was purely of a local character. If this contract had been simply for the manufacture in Philadelphia of an advertisement, and the installation of the same in the theater, a different question would be presented. We are of opinion that the case is governed and controlled by the case of *Haughton Eleva-*

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tor & Machine Co. v. *Candy Co.*, 156 Mich. 25, 27 (120 N. W. 18, 19). In that case, Justice GRANT said:

"If this contract were merely for the installation of a new elevator, plaintiff could urge with much reason that it was an act of interstate commerce, and did not fall within the cases of *Hastings Industrial Co.* v. *Moran*, 143 Mich. 679 (107 N. W. 706), and *Pittsburgh Construction Co.* v. *Railroad Co.*, 154 Fed. 929, 83 C. C. A. 501 (11 L. R. A. [N. S.] 1145), but within *Milan Milling Co.* v. *Gorten*, 93 Tenn. 590 (27 S. W. 971, 26 L. R. A. 135), and other similar cases. But repairs to buildings and machinery are in no sense interstate commerce. That part of the contract was to be performed wholly in Michigan. * * * It is local business, and corporations which undertake such work, even in a single transaction, come within the prohibition of the statute. See *Rough* v. *Breitung*, 117 Mich. 48 (75 N. W. 147)."

The court below erred in refusing to direct a verdict for the defendants on the ground that the plaintiff was a foreign corporation, and under the evidence had no right to do business in this State.

For the error pointed out, the judgment of the circuit court is reversed, and, there being no dispute as to the facts or subject-matter of the suit, no new trial is granted.

BIRD, C. J., and OSTRANDER, HOOKER, and BLAIR, JJ., concurred.

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PEOPLE v. SHARP.

1. CRIMINAL LAW—TRIAL—JURY—MISCONDUCT OF JUROR.
   After learning, upon an investigation, that a juror, engaged in the trial of a prosecution for assault with intent to murder, had stated publicly in a saloon during the trial that when he was on a jury and got his mind made up, it would take more than they then had to change it, the court properly discharged the jury, and continued the case to the next term of court.

2. SAME—CONSTITUTIONAL LAW—FORMER JEOPARDY.
   The first trial, resulting in a continuance because the juror was disqualified, did not constitute a former jeopardy.

3. SAME—TRIAL—CROSS-EXAMINATION.
   It was proper for the trial judge to permit such cross-examination of respondent's wife, who was offered by him as a witness, as would enable the jury to discover her true character and to judge of the weight which they should give to her testimony.

4. SAME—EVIDENCE—CURING ERROR.
   Where the defense was that the respondent had learned of improper relations between his wife and the complaining witness, and had attacked and shot the latter while temporarily deranged, error was not committed in receiving evidence of previous improper conduct, offered in good faith by the prosecutor who expected to prove knowledge of the same by respondent, but failed to show such knowledge, the testimony being stricken out by the court, although no reference was made to the withdrawal of the evidence in charging the jury.

5. SAME—TRIAL—ARGUMENT OF PROSECUTOR.
   Impassioned argument by the prosecuting attorney is not reversible error, unless it is unwarranted by the evidence and probably contributed to the result.

6. SAME—REQUESTS TO CHARGE—ASSAULT WITH INTENT TO MURDER.
   Any possible error in the refusal of requests to charge, and in the court's charge concerning the crime of assault with intent to murder, was cured by a verdict convicting respondent of the lesser charge of assault with intent to do great bodily harm less than murder.

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Exceptions before judgment from Mecosta; Perkins, J., presiding. Submitted June 24, 1910. (Docket No. 142.) Decided September 28, 1910.

Benjamin Sharp was convicted of assault with intent to do great bodily harm less than the crime of murder. Affirmed.

Cogger & Broomfield, for appellant.

Joseph Barton, Prosecuting Attorney, for the people.

STONE, J. This case is here upon exceptions before sentence, the respondent having been convicted of the offense of assault with intent to do great bodily harm less than the crime of murder, the information charging that the respondent at the township of Austin, in the county of Mecosta, on October 6, 1908, made an assault upon one Lewis Powers, with intent him, the said Lewis Powers, then and there to kill and murder. Upon arraignment the respondent stood mute, and a plea of not guilty was duly entered. The case came on for trial before a jury duly impaneled and sworn at the February, 1909, term of said court.

After the trial had proceeded into the second day, and after the people had rested their case, and the respondent had sworn two witnesses, the misconduct of one of the jurors was brought to the attention of the trial judge, who made an investigation into the matter by an examination of divers persons, from which it appeared, to the satisfaction of the trial judge, that the said juror had, during the trial of said cause, and after the people had rested their case and two witnesses had been examined on behalf of the respondent, stated publicly, in a saloon in the city where said trial was being had, as follows:

"I tell you when I am on a jury, and get my mind made up, by ———, it will take more than they have got now to change it."

The trial judge, having upon investigation become sat-

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isfied that said juror was biased, and disqualified, and unfit to sit in the cause, made and entered the following order in the journal of the court: After stating the title of the cause, and the progress which had been made therein, the order proceeds:

"At this point, it having come to the knowledge of the court that one of the jurymen, Ed. Lewis, had disqualified himself from further acting as a juror in this cause by having expressed in public, at the time when the cause was but partly concluded and before hearing all the evidence on the part of the defendant, the following: (here follows the language above quoted) thereby, in the judgment of the court, disqualifying him from sitting further in the case, therefore, it is ordered by the court now here that the jury be, and is hereby, discharged from the further consideration of this cause. And it is further ordered that this cause be continued until the next term of this court, recognizance to remain in full force and effect. The attorneys for respondent excepted to the action of the court in discharging the jury, and moved that the respondent be discharged, having been once in jeopardy, which motion was overruled by the court, and exception taken by attorneys for respondent."

Thereafter, and at the September, 1909, term of the court, before another jury was impaneled and sworn in said cause, the respondent filed a plea of former jeopardy, setting forth the facts above stated in detail, and at great length, which plea was overruled and denied by the court, and to which ruling respondent's attorneys duly excepted. Thereupon the court proceeded to try said cause before a jury.

Upon the part of the people the evidence tended to show that, on the evening of October 6, 1908, the respondent, while driving on the highway with his brother, met the said Lewis Powers; that the respondent there accused the said Powers of having been guilty of improper conduct with the wife of respondent, and, after some words and threats, the respondent shot said Powers with a revolver, inflicting a severe wound in the region of the

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spine, causing paralysis of the legs. It appeared that the respondent and his wife were stopping temporarily with his father's family, where the wife of respondent and two children by a former wife had been staying while respondent was West at work during the season of harvest; that during the afternoon of October 6th respondent had been told by one Charles Linsay, a brother-in-law, that Powers had been guilty of improper and criminal conduct with the young wife of respondent, while he, the respondent, had been in the West; that the respondent confronted his wife with these charges, and that she finally admitted the truth of the charges; that respondent became excited and angry, and told his wife that they could not longer live together; that she had packed her trunk and had gone to the depot to take the train to Grand Rapids; that respondent was taking her trunk to the depot, also intending to go to Grand Rapids to have a final settlement with the wife, when he met Powers, and the shooting took place.

The defense relied upon mainly was temporary insanity, and that respondent was not responsible for his conduct and not capable of entertaining a criminal intent, and there was evidence tending to show that his mother and other relatives had been insane. There are 57 assignments of error. We have carefully examined the record, and do not deem it profitable to examine each of these assignments separately. They may be classified as follows:

(1) Error in overruling the plea of former jeopardy.
(2) Errors in overruling objections of respondent's counsel in the cross-examination of respondent's wife, Gazella Sharp.
(3) Rulings of the court in overruling objections of respondent's counsel in the examination of Mary Smith Jackson.
(4) Errors in argument of prosecuting attorney to the jury.
(5) On the charge of the court.
(6) In refusing to charge as requested.

We shall consider these questions in the order in which they are above stated.

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1. We are of opinion that the conclusion reached by the circuit judge, the method pursued, and the order made by him, relating to the bias and disqualification of the juror named, were fully justified by the facts disclosed, and find support in the case of *In re Ascher*, 130 Mich. 540 (90 N. W. 418, 57 L. R. A. 806), and the authorities there cited. That is a well-considered case. Its doctrine has never been modified, and it has recently been cited with approval. *Cooper* v. *Carr*, 161 Mich. 412 (126 N. W. 468). We deem it wholly unimportant whether the juror was disqualified when impaneled and sworn, or whether he became corrupted and disqualified during the progress of the trial. In either case the duty of the court to act when such disqualification is discovered is imperative. Much must be left to the sound sense and good judgment of the trial judge in such a case. As was said by Mr. Justice Story in *United States* v. *Perez*, 9 Wheat. 579:

"We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere."

We are of opinion that the trial judge did not err in overruling and denying the plea of the former jeopardy.

2. In view of the broad scope taken in the direct examination of Gazella Sharp, the wife of respondent, we do not think that there was any error in overruling the objections of respondent's counsel in the cross-examination of this witness. As was said by Justice DURAND in *People* v. *Harrison*, 93 Mich. 596 (53 N. W. 726):

"It was the duty of the circuit judge, upon the cross-examination of the witness, to permit such reasonable interrogation upon the subject as would fairly disclose to

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the jury her true character, and thus enable them to judge of the weight which should be given to her testimony."

See, also, *Knickerbocker* v. *Worthing*, 138 Mich. 239 (101 N. W. 540), and cases there cited. We do not deem it necessary or profitable to here set forth the questions referred to.

3. In rebuttal, the prosecuting attorney sought to show by the witness Mary Smith Jackson certain alleged prior improper conduct of the wife of the respondent, and that the same had been brought to the knowledge of the respondent. It was claimed that this was proper evidence as bearing upon the real condition of the mind of the respondent at the time of the alleged assault in this case. It appearing, however, that there was no evidence that such alleged prior misconduct had ever come to the knowledge of the respondent, the trial judge struck out the entire testimony of the witness Mary Smith Jackson, and so announced in the presence of the jury. We gather from the record that the prosecuting attorney acted in good faith in attempting to introduce this evidence, and believed he could show knowledge in the respondent, as claimed. We do not think that there was reversible error here. While the trial judge might have in the charge properly called the attention of the jury to the fact that this testimony had been withdrawn from their consideration, yet, he having ordered it stricken out on the trial, we do not think that the jury was misled.

4. Much complaint is made of the argument of the prosecuting attorney before the jury. The condition of the respondent's mind at the time of the assault was a subject much discussed by counsel on both sides. The prosecuting attorney argued that respondent's counsel were invoking the doctrine of the "unwritten law," while the latter claimed that they were within the law as held in this State. While the arguments of counsel were somewhat impassioned, a careful reading of the argument of the prosecuting attorney fails to disclose any such extreme language as would justify us in reversal of the case. The

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language of Mr. Justice BLAIR, in *People* v. *Peck*, 147 Mich. 95 (110 N. W. 498), is applicable here:

"We are not disposed to reverse convictions in criminal cases because of the impassioned arguments of the prosecuting officers, unless we can clearly see that such arguments were unwarranted by the evidence and probably contributed to the result."

5. The charge of the court consisted largely of a discussion of the subjects of murder and assault with intent to murder, and correctly stated the law upon those subjects, as defined by this court. As the respondent was convicted of the lesser offense of assault with intent to do great bodily harm, much of the criticism of counsel is without force, as respondent was acquitted of the graver charge. *People* v. *Farrell*, 146 Mich. 264 (109 N. W. 440). The assignments of error are so general that it might be said that they are not entitled to consideration. We have, however, examined them in connection with the charge, and are of the opinion that there is no error in the charge.

6. Most of respondent's requests to charge relate to the graver offense of assault with intent to murder. Bearing in mind the verdict of the jury, we do not think that the trial judge erred in declining to give them, especially as the substance of them is embraced in the charge. The case appears to have been properly submitted to the jury in a clear charge in the language of the trial judge.

We find no reversible error in the record, the conviction of the respondent is affirmed, and the circuit court is directed to proceed to judgment.

OSTRANDER, HOOKER, MCALVAY, and BLAIR, JJ., concurred.

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KLOTZ *v.* CHATFIELD.

APPEAL AND ERROR—QUESTIONS REVIEWABLE—TAXATION—DEFECTIVE SPECIAL ASSESSMENT—PAYMENT.

On a bill to enjoin the levy and enforcement of a drain tax, which, it averred, was jurisdictionally defective, a showing by the State, on appeal, that, after the entry of a decree in the court below, the board of supervisors reassessed the tax which had been paid by a third party, does not properly bring the question of payment before the Supreme Court, and requires that the cause be remanded for a hearing on the point raised.

Appeal from Lenawee; O'Mealey, J. Submitted June 29, 1910. (Docket No. 109.) Decided September 28, 1910.

Bill by Effie Klotz against Willis Chatfield, drain commissioner, William Britton, treasurer, James B. Bradley, auditor general, and others, for the cancellation of a drain tax. From a decree for complainant, defendants appeal. Remanded for further proceedings.

Smith, Baldwin & Alexander, for complainant.

Theodore M. Joslin, for defendants.

STONE, J. This case presents the question of the legality of a certain tax for a drain called the "Bay Drain." The complainant is the owner of the S. W. ¼ of section 35, in the township of Ogden, Lenawee county, subject to a life estate in her mother, Lydia Klotz. It appears that the mother signed a paper purporting to convey the right of way along the east side of the land in question for said drain, but no attempt was made to obtain from complainant any release or right of way, nor was she named as a party in any of the proceedings. It appears, however, that complainant had knowledge of the proceedings, and consulted with the drain commissioner as to the route of

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the drain and the point it should reach. The original bill sought to restrain the digging of the drain and compel the filling up of any part started, but before service of injunction was had the drain upon the premises had been dug and completed. An amended bill was later filed, and the auditor general and county treasurer were made defendants, and it was sought to restrain the collection of the tax assessed upon said premises for the construction of said drain, amounting to about $117.

Upon the hearing, it appeared that the said drain tax was in form levied upon the north 60 acres of said premises, but by an error it was returned to the auditor general as against the whole S. W. ¼ of said section; that the said auditor general, upon being advised of the facts, canceled the said tax as irregular. It appears by a clear preponderance of the evidence that the complainant assented to the digging of said drain, and that the drain was a benefit to the property. The decree below made no provision relating to the digging or maintaining of said ditch or drain, but found that the defendants were proceeding, without jurisdiction, to tax and sell complainant's lands for the collection thereof. It adjudged and decreed that the proceedings to levy and collect said tax were irregular and void, and that said tax was not a valid lien against complainant's interest in said land, and that defendants had no right or authority to attempt to sell said land for said drain tax. By the terms of the decree the county treasurer was enjoined from selling said land for said drain tax, or from taking any proceeding to reassess said drain tax against the right, title, and interest of complainant in and to said land, and from making return of said lands to the auditor general for said tax as an unpaid tax. The decree bears date October 22, 1908. The defendants only appealed from the decree.

It is now represented to us by the attorney general, who files a brief in behalf of the auditor general, that since the making of the decree, and taking the appeal, the board of supervisors of said county has reassessed said

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tax upon the north 60 acres, and that said reassessed tax was, on the 19th day of April, 1910, paid to the county treasurer by one Leland F. Bean, guardian of Lydia Klotz, the life tenant of the land and the mother of complainant herein, and the attorney general has attached to his brief a certification of the auditor general as to the records of his office, relative to the land and tax in question, which shows such payment. No costs were awarded by said decree, and if the said drain tax has been paid and legally discharged the complainant has no further interest in said decree or litigation. The matter of payment is not now properly before us. We think that the case should be remanded, the decree opened, with leave to amend the answer, and evidence taken upon the subject of the payment of the tax, to the end that the true condition of the matter may be brought to the attention of the court.

The case will be remanded accordingly.

OSTRANDER, MOORE, BROOKE, and BLAIR, JJ., concurred.

MARSHALL *v.* WABASH RAILROAD CO.

TRIAL—CONDUCT OF COURT—PERSONAL INJURIES.

In an action by a passenger against a carrier for personal injuries, in which the jury awarded a large verdict and the principal issue related to the extent of plaintiff's injuries, it was error for the trial court to indicate, by remarks, in the presence of the jury, that he had observed that plaintiff was in such pain while on the stand that he had been on the point of intervening two or three times to have something done for plaintiff's comfort.

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Error to Lenawee; O'Mealey, J. Submitted June 29, 1910. (Docket No. 83.) Decided September 28, 1910.

Case by Lewis J. Marshall against the Wabash Railroad Company for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Smith, Baldwin & Alexander, for appellant.

Frank M. Sala and *Bird & Sampson*, for appellee.

MOORE, J. In February, 1908, plaintiff was a passenger upon one of the trains of defendant, which train was derailed. It is his claim that he then received severe injuries. He sued the company and obtained a judgment for $9,987.50. The case is brought here by writ of error.

Counsel for defendant discuss the assignments of error under 11 heads. The trial of the case was hotly contested. The printed record contains upwards of 350 pages. We shall not go into it in detail, though we have carefully considered it. The case in the main was well tried, and we find that many of the assignments of error are not well taken. We shall refer only to the following groups of assignments of error:

(2) Treatment of defendant's witness Mr. Bice.
(3) Improper conduct of plaintiff's counsel during trial.
(4) Improper remarks of court during trial.
(10) Improper argument.

As to groups 2 and 10: The cross-examination of Mr. Bice, and the argument of counsel came dangerously near, if it did not go outside of, the boundary lines of a proper cross-examination, and a proper argument. As the case must be reversed for a reason stated later, we think it unnecessary to decide whether reversible error was committed in this respect.

As to groups 3 and 4: The plaintiff was on the stand as a witness. The record discloses the following:

"One of the attorneys for the plaintiff (bringing a coat

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folded to plaintiff) said, Will it be helpful to you to put this coat behind your back?

"*Mr. Smith:* I object to this statement.

"*Attorney for Plaintiff:* He is having pain.

"*Mr. Smith:* There is no evidence of it.

"*The Court:* I think if there can be anything done here that will benefit the witness that it may be done.

"*Mr. Smith:* He hasn't manifested any such thing, I submit, or asked for it, or claimed to have been in any pain whatever, and I take exception to this.

"*The Court:* Do you contend that external indications have not been that he is in pain, in some distress?

"*Mr. Smith:* I don't like to state any claim about it. I doubt it myself.

"*The Court to the Attorney:* You may pass him the coat that is offered if he desires it.

"*Mr. Smith:* Take an exception. (To the ruling and remarks of the court, counsel for defendant excepted.)"

This witness was called at the opening of court in the morning. Examination continued:

"*Q.* Your attorney has just placed a coat behind you?

"*A.* Evidently.

"*Q.* Don't you know?

"*A.* Yes, sir.

"*Q.* You sat all day long in a hard chair right at the end of this table yesterday, didn't you?

"*A.* I certainly did.

"*Q.* Do you say that you squirmed around and made any indication that you were in pain, sitting in that chair all day long yesterday?

"*A.* I did. I certainly was in pain, and it was just as much in evidence as it is now.

"*Q.* Why didn't you ask for a cushion yesterday?

"*A.* Well, I didn't think that you had any cushions.

"*Attorney for Plaintiff:* I object to that as assuming that he asked for a cushion today, which he didn't.

"*The Court:* I think the objection is good. The court was on the point two or three times of suggesting to the doctor, before offer of this folded coat to place behind his back, if he needed a rest, or whether he desired the cross-examination to proceed.

"*Mr. Smith:* I take an exception to this statement. I submit it is not proper for the court to state the impression, and I ask the court now to say to the jury that it is not for their consideration.

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"*The Court:* Gentlemen, I suppose we may judge people somewhat by their appearance. Of course, it would be for the jury to say whether these expressions, these movements while in the witness chair, were real, or whether they were simulated, and if they believe that they were simulated it should be taken against the plaintiff instead of in his favor, because this is no place to do anything or to have any acting that is attempted by way of aiding the case of the plaintiff here, and the matter would be for the jury to determine whether what has been observed by the jury, as well as the court and counsel, were real, or whether they were simulated.

"*Mr. Smith:* I ask the court to say that simulations during the trial of the case, when the case is pending, long after the accident, and expressions of this kind, are not competent.

"*The Court:* Expressions of what kind, Mr. Smith?

"*Mr. Smith:* Expressions indicated here by the court's remarks.

"*The Court:* Well, I suppose, Mr. Smith, that if a man was actually suffering pain that he wouldn't be under obligation, he could hardly be charged with simulation if some outward expressions of that pain were manifested; but, as I say, the jury would be instructed now and at the conclusion of the case that, if they believe that there is simulation here and there is no real pain, that then what has been witnessed and manifested here should be taken against the plaintiff in undertaking to aid his case and aid a recovery here by acting and by appearance conveyed to the court and the jury and counsel were unreal and simulated, if they so believe.

"*Mr. Smith:* I didn't quite care to convey that idea of it, but what I understand the rule to be is that voluntary exclamations right after injury and before a lawsuit is started are competent if detailed or shown, but, after a lawsuit has been started and there is a controversy, I don't understand that such things are competent.

"*The Court:* I think not.

"*Mr. Smith:* That is why I object.

"*The Court:* Except if one is in pain at a particular time, during the trial, and there are manifestations of that, external manifestations, that if assistance is offered to undertake to relieve the pain or make it less, that it is not anything upon which an objection could be founded, so far as the trial is concerned.

"*Mr. Smith:* I take an exception to the ruling."

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One of the very important subjects of contest was the extent of the injury sustained by plaintiff, and whether he was still suffering pain traceable to the injury, and the extent of it. What we have quoted from the record makes it clear that the jury were given to understand the judge had observed the witness was in such pain that the judge was on the point of intervening two or three times to have something done for the comfort of the witness, who was also plaintiff. An impression of this sort obtained by the jury from the judge would be hard to remove, and we cannot say what then occurred, as shown by the record, did not influence the jury, when it gave the plaintiff the very substantial verdict it did.

While we have examined the other assignments of error, we deem it unnecessary to discuss them further than to say they do not establish reversible error.

Judgment is reversed, and new trial ordered.

ORTRANDER, BROOKE, BLAIR, and STONE, JJ., concurred.

HOSNER *v.* VILLAGE OF LEONARD.

MUNICIPAL CORPORATIONS—VILLAGES—PRESIDENT — EMPLOYMENT OF ATTORNEY.

Section 2727, 1 Comp. Laws, requiring the president of a village to see that the laws relating to the village and the ordinances and regulations of the council are enforced, confers authority on the president to employ an attorney to prosecute the violation of an ordinance, in the absence of any action of the village council providing for the employment of an attorney.

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Error to Oakland; Smith, J. Submitted June 28, 1910. (Docket No. 156.) Decided September 28, 1910.

Assumpsit by William T. Hosner against the village of Leonard for services rendered. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

K. P. Rockwell and *H. M. Zimmermann*, for appellant.

George O. Kinsman and *William T. Hosner*, for appellee.

BLAIR, J. Plaintiff brought suit to recover, upon the *quantum meruit*, for his services as an attorney at law in prosecuting one Schnider in justice's court and, on appeal, in the circuit court, for an alleged violation of an ordinance of the defendant. See *Schnider* v. *Montross*, 158 Mich. 263 (122 N. W. 534). Plaintiff was employed by the president of the village with the consent of a majority of the trustees, but without any formal action of the council. After the trial in justice's court, which resulted in a conviction, plaintiff sent in his bill, which the council did not allow. After the trial in the circuit court, which resulted in the acquittal of the respondent, plaintiff sent in his bill for the entire service, which was disallowed.

Appellant contended in the lower court that, as there was no official employment of plaintiff by the council, he could not recover. Plaintiff contended that if the jury should find, as the evidence tended to show, that all the members of the council knew of plaintiff's employment by the president, that he was performing the services, relying upon the village paying for them, and gave him no notice that they would not recognize such services as creating any obligation on the part of the village, the village would be estopped to question its liability. The case was submitted to the jury on plaintiff's theory, and a verdict returned for plaintiff. Defendant brings the case to this court for review upon writ of error.

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We do not deem it necessary to discuss the various assignments of error, since, in the view we take of the case, the plaintiff was entitled to an instructed verdict. Section 2727, 1 Comp. Laws, makes it the duty of the president to "see that the laws relating to the village and the ordinances and regulations of the council are enforced." Section 2761 provides that prosecutions for violations of ordinances may be commenced by warrant, and that the proceedings thereon shall be substantially the same as in criminal cases. In view of the serious effect of such proceedings upon the accused, his right to a speedy trial, the necessity for legal advice upon the part of the president to enable him to discharge his duty, and of the employment of a lawyer to conduct the prosecution, we are of the opinion that, in the absence of any action on the part of the council providing for such employment, the section quoted confers upon the president the required authority. See *People* v. *Vinton*, 82 Mich. 39 (46 N. W. 31).

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, MOORE, and BROOKE, JJ., concurred.

PEOPLE, *for use of* WIPFLER, *v.* FIDELITY & DEPOSIT CO. OF MARYLAND.

1. PROCESS—FOREIGN BONDING COMPANIES—VENUE—JURISDICTION—COURTS—SERVICE OF PROCESS.

An action of assumpsit against a foreign corporation, as surety upon the bond of a receiver, may be instituted in the county of plaintiff's residence, and service obtained in another county in which an agent for service of process, appointed under 2 Comp. Laws, § 5198, resides.

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2. SAME—JOINT DEFENDANTS—PROCESS.
The validity of service of such process is not affected by the joinder in the action of another defendant upon whom no service of process is obtained.

3. SAME—STATUTES.
Act No. 321, Pub. Acts 1907, does not change the effect of the statute requiring such appointment, since the amendment refers only to bonds of liquor dealers.

4. SAME—TITLE OF ACT—CONSTITUTIONAL LAW.
2 Comp. Laws, § 5198, is sufficiently entitled to indicate the purpose of the statute, which is not to change the jurisdiction of the courts, but to impose conditions upon foreign surety companies doing business in Michigan.

5. SAME—SERVICE OF PROCESS.
Such corporation may consent to the acceptance of service in a State where it is transacting business, and in which it is not a resident or citizen.

Certiorari to Jackson; Parkinson, J. Submitted July 15, 1910. (Docket No. 165.) Decided September 28, 1910.

Assumpsit by the people of the State of Michigan, for the use and benefit of Lucy Wipfler, against Charles W. Wipfler and the Fidelity & Deposit Company of Maryland on a receiver's bond. An order overruling a motion to quash the service of process upon defendant company is reviewed by it on writ of certiorari. Affirmed.

Grove H. Wolcott, for plaintiff.

Brennan, Donnelly & Van De Mark, for defendant company.

STONE, J. Lucy Wipfler, a resident of the county of Jackson, brought suit in assumpsit in the circuit court for that county against Charles W. Wipfler and the Fidelity & Deposit Company of Maryland, a foreign corporation, which is engaged in doing a bonding and surety business in this State. The return of the circuit judge shows that the suit was begun by the filing of a declaration, with rule

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to plead, on March 31, 1910. No service was had upon defendant Charles W. Wipfler. Upon the same day that declaration was filed, a copy thereof, with notice of the rule to plead indorsed thereon, was served upon Charles Whitaker, attorney in this State for the Fidelity & Deposit Company of Maryland, for service of process. This service took place in Wayne county. On April 14, 1910, the defendant the Fidelity & Deposit Company of Maryland filed a special appearance for the purpose of making a motion to quash and hold for naught the service of the declaration upon it upon the grounds:

(1) That the agent upon whom the service was made was a resident of Wayne county, and the service of the declaration was made in Wayne county.
(2) That the defendant Wipfler was not a resident of Jackson county.

The motion was denied, and the case is here upon a writ of certiorari obtained by the Fidelity & Deposit Company of Maryland to review the action of the circuit court in overruling its motion to quash the service of said declaration.

The question is squarely presented whether the service of a copy of the declaration upon the attorney for the Fidelity & Deposit Company of Maryland, in Wayne county, is valid service, no service having been obtained upon the other joint defendant in Jackson county, nor, in fact, anywhere. The plaintiff seems to rely upon the last clause of section 5198, 2 Comp. Laws, and the appointment of attorney filed with the commissioner of insurance by the Fidelity & Deposit Company of Maryland. The clause of the statute referred to reads as follows:

"And if such company be organized under the laws of any other State than this State, it * * * must appoint an attorney in this State on whom process of law can be served, and file in the office of the insurance commissioner a written statement duly signed and sealed, certifying such appointment, and which shall continue until another attorney is substituted."

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It will be noted that this language is very broad and general. The company must appoint an attorney in this State on whom all process of law can be served, because there is no limitation. The written appointment filed by said defendant pursuant to the statute is as follows:

"Know All Men by These Presents: That the Fidelity & Deposit Company of Maryland, Surety Company of the City of Baltimore, in the State of Maryland, having been admitted, or having applied for admission to transact the business of surety insurance in the State of Michigan, in conformity with the laws thereof, does hereby make, constitute and appoint Charles Whitaker, Esq., of the city of Detroit, county of Wayne, its true and lawful attorney, in and for the State of Michigan, on whom all process of law, whether mesne or final against said insurance company, may be served in any action or special proceeding against said company in the State of Michigan, subject to and in accordance with all the provisions of the statutes and laws of said State of Michigan now in force; and such other acts as may be hereafter passed amendatory thereof and supplementary thereto. And the said attorney is hereby duly authorized and empowered, as the agent of said company, to receive and accept service of process in all cases as provided for by the laws of the State of Michigan, and such service shall be deemed valid personal service upon said company. This appointment is to continue in force for the period of time and in the manner provided by the statutes of the State of Michigan, and until another attorney shall be duly and regularly substituted.

"The said company further stipulates and agrees that any legal process affecting such company, served on the commissioner of insurance of the State of Michigan, or his deputy, shall have the same effect as if personally served on the company or its authorized attorney in said State of Michigan. The said company stipulates that when process against or affecting it, is served on the commissioner of insurance, or his deputy, a copy of such process shall be mailed to the Home Office, Baltimore, Maryland."

This instrument bears date February 16, 1903.

Our attention has been called to Act No. 321, Pub. Acts 1907, amending section 5196, 2 Comp. Laws, and

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the question has been suggested whether this act in any way affects the provision of section 5198, above quoted. In our opinion it does not. We agree with defendants' attorneys when they say in their brief:

"Under the original act liquor bonds could not be executed by surety companies. The main intention of the amendatory act was to provide for the execution of these bonds, and to permit the same to be executed by corporations organized under the laws of our State. This object was accomplished by adding a number of provisos to section one of the original act. As this section now stands, it contains six provisos. The first proviso forbids the acceptance of a surety company as surety for the appearance of any person charged with crime. The second, third, fourth, and fifth provisos all deal with the subject of liquor bonds. Immediately following comes proviso sixth," which is as follows:

"*Provided, further*, That suits may be commenced in the circuit court in any county where the plaintiff resides, by declaration or writ, and service shall be made in such cases *only* upon the commissioner of insurance in like manner and with like effect as is provided for the service of process upon societies, orders or associations organized under the laws of any other State, Province or Territory, and doing business in this State, and not having its principal office within this State, and for the purpose of service of process as herein provided such surety company shall appoint in writing the commissioner of insurance, or his successor in office, to be its true and lawful attorney."

It is reasonable to suppose that this refers to cases upon that class of bonds referred to in the preceding provisos. It seems to refer to service of process upon a domestic corporation, for it provides that such service shall be with "like effect as is provided for the service of process upon societies, orders, or associations organized under the laws of any other State, Province or Territory, and doing business in this State," etc. The entire purpose of the amendatory act seems to have been to provide for the execution of liquor bonds by domestic corporations, and proceedings in case of suit thereon. In our opinion the provision in

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section 3, being section 5198, 2 Comp. Laws, above quoted, stands unrepealed and unaffected by the amendment of 1907. It relates to foreign companies doing business in this State. It is said that the precise question here presented has not been before this court. Counsel for both parties have called our attention to *Smith* v. *Assurance Society*, 159 Mich. 167 (123 N. W. 588). There the plaintiff, a resident of Manistee county, brought an action in the Wayne circuit court against a foreign insurance company, and the suit was dismissed upon the ground that the court did not have jurisdiction. In an opinion affirming the action of the circuit court, Justice MONTGOMERY, after referring to section 10015 *et seq.*, 3 Comp. Laws, relating to foreign insurance companies, said:

"The question presented is whether this statute is a modification of the rule of law previously existing, to the extent that it authorizes the bringing of a suit in any county in the State if service of process be had upon the commissioner. We do not so construe the statute. The general rule and statutes relating to service of process fix jurisdiction, and undoubtedly the action might be brought in the county of the plaintiff's residence, or in any county where service might be had upon a duly authorized agent of the defendant. But this statute is designed to avoid the necessity of such service, but was not intended to change the jurisdiction, and to confer it upon any court in the State."

Had the suit been brought in Manistee county circuit court, we think a different conclusion would have been reached.

It is urged by counsel for the defendants that there is nothing in the title of the act relating to surety companies to indicate that it was the intention of the legislature to change the general rule which fixes the jurisdiction of our various circuit courts to try causes, nor to institute and authorize a new manner of service which would enlarge the jurisdiction of such courts, and give them power to entertain causes which previously could not have been brought before them. We think that it may be said that

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the act by its title and provisions states the terms and conditions upon which surety companies will be accepted, and the conditions and qualifications upon which they will be permitted to do business in the State, and among them is the appointment of an attorney to accept service of process. It is not an act affecting the general jurisdiction of the courts. It is rather a provision that the companies coming into the State and doing business there may consent to service of process in the mode prescribed, and, when they designate persons upon whom process may be served, they thereby consent to the mode, and waive the general provisions relating to service. In *Ex parte Schollenberger*, 96 U. S. 369, it was said:

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located, by or under the authority of its charter; but it may, by its agents, transact business anywhere, unless prohibited by its charter, or excluded by local laws. Under such circumstances it seems clear that it may, for the purpose of securing business, consent to be 'found' away from home, for the purposes of a suit, as to matters growing out of its transactions. The act of congress prescribing the place where a person may be sued, is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented. Here the defendant companies have provided that they can be found in a district other than that in which they reside, if a particular mode of proceeding is adopted, and they have been so found. In our opinion, therefore, the circuit court has jurisdiction of the causes, and should proceed to hear and decide them."

See, also, *Gray* v. *Quicksilver Mining Co.*, 21 Fed. 288, and cases cited; *Cofrode* v. *Wayne Circuit Judge*, 79 Mich. 332 (44 N. W. 623, 7 L. R. A. 511). The suit was brought where it could be tried — in the county of the plaintiff's residence. Section 10216, 3 Comp. Laws; *Haywood* v. *Johnson*, 41 Mich. 604 (2 N. W. 926). To

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hold with the contention of the defendant is to decide that all suits against this defendant must be brought either in the county of Wayne or Ingham. We think that the understanding of the profession has been that such a suit as this is, and suits generally against foreign insurance companies, may be brought in the county where the plaintiff resides, and that service may be had either upon the commissioner of insurance or the attorney appointed, at the option of the plaintiff. We do not think that section 10010, 3 Comp. Laws, has any application here. Under the provisions of section 10371, 3 Comp. Laws, where one joint defendant has not been served with process, judgment may be rendered in form against both, and the three following sections provide for execution and proceedings thereon. We think that the defendant corporation has voluntarily submitted itself to the jurisdiction of the courts of this State under the act of the legislature cited, by its compliance with the terms thereof, and that the plaintiff had a right to begin suit in the county of her residence, and serve process either upon Mr. Whitaker or the commissioner of insurance or his deputy.

We think that the circuit judge reached the correct conclusion, and his order overruling the motion is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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BUELL *v.* MENOMINEE RIVER LUMBER CO.

EQUITY—LACHES—TRUSTS.

Delay of over thirty years in the enforcement of a trust in real property, which, the circumstances tended to show, had been, with the consent or acquiescence of complainant, conveyed by quitclaim deed by the trustee to third parties, bars the attempted enforcement of the trust, on the ground of laches.

Appeal from Dickinson; Stone, J. Submitted June 21, 1910. (Docket No. 116.) Decided September 28, 1910.

Bill by John L. Buell against the Menominee River Lumber Company, the Chicago, Milwaukee & St. Paul Railway Company, and William J. Turner to obtain the appointment of a successor to a deceased trustee, for the cancellation of certain deeds, and for an accounting. From a decree for defendants, complainant appeals. Affirmed.

A. L. Sawyer, for complainant.

E. C. Eastman (*D. H. Ball*, of counsel), for defendants.

BLAIR, J. The bill of complaint in this suit was filed March 20, 1908, to obtain the appointment of a trustee to succeed a deceased trustee, or to induce the court of chancery to execute the trust, to obtain the cancellation of certain deeds of the real estate constituting the subject-matter of the trust, and for an accounting.

It appears from the evidence, and the court found, that in the summer of 1875 negotiations were entered into by and between complainant and the defendant Menominee River Lumber Company for the laying out and platting of a town site in lands described in the bill of complaint

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which then belonged to said defendant. When these negotiations were begun, a railroad was being projected across said lands by the Chicago & Northwestern Railway Company, and it was the desire of the parties to have a depot established on said proposed town site. Pursuant to said negotiations, and in consideration of the trust agreement, the complainant directed the survey and cutting out of streets for the plat, and in that connection paid out from $600 to $800 as the expense of the work including the survey. Under date of September 14, 1875, pursuant to said negotiations, said defendant Menominee River Lumber Company, by warranty deed, conveyed the land in question, consisting of six 40's to Daniel Corry. and, concurrently with such conveyance, said Daniel Corry and said lumber company entered into an agreement which, after reciting the deed to Corry of the real estate in question, contained, among others, the following provisions:

"And whereas the said lands were deeded to said Daniel Corry, party of the first part, in trust for the said Menominee River Lumber Company, John L. Buell of Menominee county, Michigan, and the said Daniel Corry as will hereinafter appear: Now, therefore, this indenture witnessth: that the said Daniel Corry for and in consideration of the sum of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, hereby agrees and binds himself to pay to said Menominee River Lumber Company, and John L. Buell from the proceeds of sales he shall make of the above lands or portions of them amounts as follows: *First.* The gross amount of all sales made by him shall be paid to the Menominee River Lumber Company till the sum of $300.00 with interest thereon at the rate of seven per cent. per annum from the date of this agreement shall be fully paid. *Second.* From the moneys received by him derived from the sale of said lands or any portions thereof after paying the sum of three hundred dollars aforesaid, and after paying all taxes and the expenses attendant upon clearing up and grading streets and alleys and in surveying and platting the same, he shall pay three-fifths ($\frac{3}{5}$) of the proceeds remaining to the Menominee River Lumber Company, one-fifth ($\frac{1}{5}$) of the

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same to John L. Buell and one-fifth (⅕) to himself, the said Daniel Corry, which said one-fifth (⅕) each to said Daniel Corry and John L. Buell it is mutually understood and agreed shall be in full for all services rendered by them; payments to be made as fast and as soon as the money derived from such sale is received. And the said Daniel Corry hereby agrees and binds himself to keep a complete record of all sales made by him and of all moneys paid out or expended, which shall at all times be open to the inspection of said Menominee River Lumber Company and John L. Buell; it is mutually understood that the pine timber suitable for lumber now standing on the herein described lands and the minerals (if any there be) on or in or under them shall remain and be in full the property of said Menominee River Lumber Company; and that it shall have the right to enter upon the said lands at any and all times within the period of five years for the purpose of cutting, protecting or removing the said timber and at any or all times for the purpose of prospecting for, mining or moving ore."

The deed and agreement were duly recorded in the office of the register of deeds. The railway company declined to establish a depot on these lands but placed it a half mile west thereof, and, in consequence, the principal object of the parties to the trust agreement failed and the lands became substantially valueless for purposes of sale. Corry, the trustee, made no sales, and on April 9, 1877, he made the following agreement with complainant:

"Know all men by these presents, that I, Daniel Corry, of Cedarville, State of Michigan, do hereby agree with John L. Buell of Menominee, State of Michigan, that I will recognize and affirm all sales and contracts that said John L. Buell may enter into with any person or persons by sales or contracts of any and all lots in the town of Sturgeon, meaning the village site of Sturgeon now platted, but not recorded and situated upon the north half of N. W. ¼ section 14, township 39 N. of range 29 W. Menominee county, Michigan. Provided that no sale or contract shall be made with any person or persons for the sale of more than two lots to any one party or parties. This contract shall remain in full force and effect for the term of one year and shall terminate on the 9th day of April, A. D. 1878."

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Complainant made no effort to sell lots under this agreement, probably because he knew that such effort would be unavailing, and on July 18, 1879, Corry and wife executed a quitclaim deed of the lands to the defendant lumber company, which were thenceforth treated, used, and disposed of by such company as its individual property. This deed was duly recorded December 17, 1879, but complainant testified that he had no knowledge of it prior to 1907, and during all of that time considered that he was the owner of the interest acquired under the trust deed. The entire conduct of complainant and the surrounding circumstances are inconsistent with his testimony. He was a very intelligent man, living within six or seven miles of the land, experienced in, and familiar with, real estate transactions, and dictated the trust agreement himself. He was engaged in selling real estate, exploring for and exploiting mines, and in other money-making projects, and may reasonably be presumed to have had the usual regard of men for their own property interests. The fact that he made no inquiries with reference to these lands and apparently took no further interest in them after the expiration of his power of attorney until years after the death of Corry, which occurred January 5, 1893, satisfies us that he either knew of the quitclaim deed and acquiesced therein or considered his interest of no value and abandoned it. His testimony that he did not know of the deed, but supposed for over 30 years that he had a valid, subsisting interest, is overcome, in our opinion, by the circumstances of the case as we find them to be established by the testimony.

The complainant was, as held by the lower court, guilty of such laches as to bar his suit.

The decree is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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OCTOBER TERM, 1910.

STANDART BROS. *v.* INGHAM CIRCUIT JUDGE.

1. RECEIVERS — SUIT IN NAME OF RECEIVER — CREDITORS OF DISSOLVED CORPORATION.
   In proceedings for the dissolution of a corporation, for which a receiver has been appointed, the circuit court in which the proceedings are pending may exercise its discretion in permitting, or in refusing to permit, the receiver to employ the fund in litigation at the request of some creditors, and against the objection of others.

2. SAME—DISCRETION—SUITS BY RECEIVER.
   Such discretion may be affected by the apparent hazard of the litigation.

3. SAME—EQUITY—EXPENSES.
   It is inequitable to impose a condition that the interested creditors shall give security for the costs and expenses of the proceeding without giving them the right to be first paid from the fund which may result from the litigation.

Mandamus by Standart Brothers, Limited, to compel Howard Wiest, circuit judge of Ingham county, to grant an order allowing relator to bring an action at law in the name of the receiver of an insolvent corporation. Submitted October 4, 1910. (Calendar No. 24,266.) Writ granted October 5, 1910.

Bernard B. Selling, for relator.

C. P. Black, for respondent.

PER CURIAM. The circuit court, in chancery, having control of the receiver of a corporation and of the fund in his hands, may exercise discretion in permitting, or in refusing to permit, the receiver to employ the fund in litiga-

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tion desired by some of the creditors of the corporation and not desired by others. The exercise of this discretion will be influenced by the apparent hazard of the litigation proposed to be carried on. We see no reason for saying that discretion was not properly exercised by the court below, in view of all the circumstances disclosed, in refusing the receiver permission to employ the fund in the litigation proposed to be carried on. But the considerations which support the ruling of the court in this respect also require the order which was made to be modified, because it is inequitable to permit the receiver to proceed only upon the condition that all costs and expenses to be made shall be secured and paid by petitioning creditors desiring the litigation, and to deny such creditors, and others who may care to contribute, the right to be first paid out of the fund, if any, which shall be the result of the litigation.

The order will be so modified as to provide that all creditors of the corporation contributing to the costs and expenses of the litigation shall be first paid, not only disbursements but their unpaid demands, out of any moneys recovered by said receiver. No costs are awarded.

NICHOLS v. NICHOLS.

DIVORCE—ALIMONY AND EXPENSES—APPEAL AND ERROR.

Although a complainant's bill for divorce against his wife was dismissed, with an allowance of costs to defendant, who appeals on the ground that the allowance was insufficient and that the court denied her cross-bill praying to have a certain contract of separation set aside, an allowance may be made for preliminary expenses and attorney's fees on motion in the appellate court.

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Bill by George H. Nichols against Elizabeth Nichols for a divorce. Defendant filed an answer in the nature of a cross-bill asking affirmative relief. A decree was entered dismissing both the bill and the cross-bill, from which defendant appealed: On motion of defendant for an allowance for expenses pending the appeal. Submitted July 14, 1910. (Calendar No. 24,315.) Motion granted October 28, 1910.

Sloman & Sloman, for the motion.

Lucking, Emmons & Helfman (*C. H. Nunnelly*, of counsel), *contra*.

MOORE, J. In the matter of the petition of Elizabeth Nichols for allowance to pay expenses of appeal.

George H. Nichols and his wife, Elizabeth Nichols, after living together a long time, separated, and a contract was made between them by which he was to pay her $7 a week for her own support, and $5 a week for the support of their 11-year old son. Later Mr. Nichols filed a bill of complaint for the purpose of obtaining a decree of divorce upon the ground of cruelty. Defendant answered this bill. Later the bill of complaint was amended and an answer was interposed by the defendant in the nature of a cross-bill, in which defendant asked for affirmative relief by having the contract referred to above set aside. After a full hearing running through 13 days, a decree was entered dismissing complainant's bill of complaint, and also dismissing the cross-bill, but without prejudice. In this decree it was provided that complainant pay a solicitor's fee of $125, and the witness fees and legal expenses of obtaining them. The defendant has appealed from this decree, and files an application in this court for a solicitor's fee, for temporary alimony, and for a sufficient sum of money to pay for a transcript of the testimony, and to pay for the printing of the record and briefs.

On the part of the complainant, it is insisted that, as

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complainant's bill of complaint in which he applied for a divorce has been dismissed, from which decree he has taken no appeal, the question of divorce is eliminated from the case, and that this court is without authority to make any order in the premises. We think this contention cannot be sustained. The proceeding is a divorce proceeding, and the question of costs and the question of the contract are incidents thereto. The solicitors for the defendant claimed that only a tithe of the costs was allowed to them that should have been. They also urge that a very generous allowance should be made to them for their services in this court.

The questions involved in the main case are such that they cannot very well be disposed of upon *ex parte* affidavits. We think an allowance of $100 for solicitor's fees and $150 for expenses may be made now, and any other allowance may well await a disposal of the case upon its merits.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

KAISER v. DETROIT UNITED RAILWAY.

APPEAL AND ERROR — DISMISSAL OF WRIT OF ERROR — REMAND — MOTIONS.

Where a bill of exceptions was settled irregularly because the last order extending the time was entered without cause shown, and defendant had caused a writ of error to issue, return to be made and had the record printed, he was permitted to dismiss the writ of error on terms, issue a new writ and include the original printed record as a portion of the record on the second appeal.

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Case by Christopher E. Kaiser against the Detroit United Railway for personal injuries: On motion to remand the record and permit appellant to apply for an extension of time to settle a bill of exceptions. (Calendar No. 24,053.) Submitted October 18, 1910. Motion granted November 4, 1910.

Brennan, Donnelly & Van De Mark, for the motion.

William M. Mertz, contra.

PER CURIAM. After various extensions of the time to settle a bill of exceptions in this cause, one was settled, the record was brought into this court by writ of error, and was printed. It appears by affidavit that the judgment was entered November 5, 1909, the writ of error issued May 13, 1910, and return thereto was made June 11, 1910. On application of the plaintiff, we held, in a mandamus proceeding brought to set aside the last order extending the time for settling a bill of exceptions, that the last order made extending the time was made without authority. *Kaiser* v. *Wayne Circuit Judge*, 162 Mich. 247 (127 N. W. 336). We also said that the court below had no jurisdiction upon cause shown to extend the time to settle exceptions. Later, at the present term of court (162 Mich. 250 [127 N. W. 922]), we filed an opinion modifying the former opinion in such manner as not to deny the power of the court to entertain a motion, upon cause shown, to extend the time to settle exceptions. Defendant now moves for an order remanding the record for the purpose of enabling the defendant to move the trial court for an order extending the time for settling a bill of exceptions and to permit an amended return to be made to the writ of error heretofore issued, within a time to be fixed.

There is no reason why plaintiff in error should not be permitted to dismiss the writ of error upon payment of costs. Upon such dismissal a new writ may at once issue, whether exceptions have been settled or not. The circumstances are peculiar, and if, as seems to be probable, some

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of the cost and expense of bringing the cause into this court and of printing the record can be saved in case the court below now settles a bill of exceptions, no good reason is perceived for denying the motion to remand the record.

Defendant may have an order dismissing the writ and remanding the record. If exceptions are settled, the further record of the proceedings in that behalf may be printed, attached to, and made a part of the present record. But the order will be entered upon condition that, if a new writ of error is issued and returned, the cause, at the option of the plaintiff, stands for hearing at the January, 1911, term of this court, and that defendant tender and pay to plaintiff, or his attorneys, an attorney fee of $25.

LESSNAU v. CATHOLIC ORDER OF FORESTERS.

1. INSURANCE — FRAUD — WARRANTIES — FRATERNAL BENEFICIARY SOCIETY.

Deceased applied for admission to a fraternal beneficiary order, representing that he was a polisher. In accordance with the rules of the association he underwent a medical examination and stated in a subsequent application that his occupation was drawing dirt and he had no regular employment. The representations were true at the time. A committee of defendant having investigated his standing and the truthfulness of his representations, recommended his admission to the society. In the benefit certificate thereafter issued to the insured, a clause provided that the statements of the first application for membership should be warranties in the contract. At the time of his death the insured worked as a metal polisher, an occupation prohibited to members of

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the order. *Held*, that the preliminary application truly stated the occupation of the insured, and that, after an investigation of the facts, the receipt of dues and premiums during the lifetime of insured estopped the defendant from questioning the validity of the policy on the ground of fraud. HOOKER and BROOKE, JJ., dissenting.

2. SAME—PLEADING—NOTICE OF DEFENSE.

A notice of fraud in procuring the policy of insurance, under a plea of the general issue, relieves the plaintiff of the necessity of showing that due proofs were furnished of the death of insured or that he was a member of the order in good standing at the date of his decease.

3. SAME—PLEADING—AMENDMENT—PRACTICE.

It was not error, in an action that had been pending for more than a year, after the trial of the case had continued for some time and defendant entered upon its defense, for the court to deny an application of defendant to amend its notice of defense by inserting an allegation that deceased had changed his occupation after the issuance of his benefit certificate and had thereby invalidated his policy.

Error to Wayne; Murfin, J. Submitted January 13, 1910. (Docket No. 70.) Decided November 11, 1910.

Assumpsit by Mary Lessnau against the Catholic Order of Foresters on a policy of insurance. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Thomas W. Thompson (*Devine & Snyder*, of counsel), for appellant.

Dohany & Dohany, for appellee.

Defendant's appeal is from a directed verdict and consequent judgment upon a mutual benefit policy. The defendant order—*i. e.*, the supreme court—has its office in Chicago; local subordinate courts being established in many places. All policies are issued under established by-laws, and these provide that one desiring to join a local court and obtain a policy of insurance, which only issues from the supreme court, must proceed as follows:

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(1) He must be proposed for membership in a prescribed manner and form, and in the proper local court. In connection with such proposal he must state over his signature many prescribed things. His proposal must be indorsed by two members of the order in good standing. If upon presentation and reading "any such proposal" it is found that all statements subscribed by him indicate his eligibility to membership—the passing of the medical examination being excepted—the proposal shall be referred to an investigation committee of three members, who shall investigate the truth of his statements, and other matters in relation to his eligibility and desirability as a member, and, upon a favorable report, he may be admitted to membership by vote of the local court, subject to the action of the supreme court.

(2) After election he must appear before the medical examiner for the "purpose of making a formal application for membership, and undergoing a medical examination."

(3) In this formal application for regular membership the applicant shall, over his full signature, state the amount of benefits that he desires to carry, the name of the beneficiary, and many other things, including "the nature and name of his business or occupation," and that he agrees, if any of the statements or any of the answers made to the medical examiner's questions are found to be fraudulent, to forfeit on behalf of himself and his beneficiaries "all rights in and all moneys paid by him into the order."

(4) Every "formal application for regular membership, together with the records of the applicant's medical examination, shall, without delay, be forwarded to the high medical examiner, by the medical examiner," for approval by him, etc.

(5) Persons engaged in any of the following occupations shall not be eligible to regular membership. (Here follows a long list of occupations, including "professional metal or tool polisher.")

(6) Any member of the order who changes his occupation from either the "ordinary or hazardous" class to the "prohibited class shall by that fact lose his membership."

These provisions are found in the by-laws, and deceased's standing at the time of his death must be tested by them.

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The proposal for membership was in writing signed by two persons, presumably members of the order. Appended to it was a blank containing questions only partially filled by answers, and signed by the deceased. It was not dated, but it is apparently conceded to have been presented to the local court in November, 1905. It stated deceased's occupation as that of a "polisher." Presumably the regular course was taken by the local court. The formal application for membership was dated January 21, 1906. In it deceased stated:

"My occupation is that of driver of dirt wagon, and my place of business is at No. 730 Hancock street. * * * I do hereby certify and declare that the statements by me made above are each and all true in fact, and I do hereby warrant said statements and each one of them to be true in fact, and I do hereby agree that, should any statement so made by me be untrue in fact, * * * or should any concealment of facts be made by me in this application, that then and in such case I do thereby forfeit the rights of myself and of my beneficiary or beneficiaries, and of any and all other persons whomsoever to any and all benefits and privileges of the order, including all claims and demands by virtue of any benefit certificate that may have been issued to me by said order, and including also all moneys paid by me to said order for any purpose whatsoever."

It was duly signed by him, and in the remarks appended thereto by the medical examiner such officer said:

"Applicant has no particular employer; takes jobs of hauling dirt, etc.; owns team and wagon."

A certificate of approval by the high medical examiner was made and sent to the high secretary immediately after initiation and was received on February 16, 1906.

The policy was dated and delivered February 13th, which appears to have been the date of the initiation. It contained the following provisions:

"(1) The statements made by said member in the proposition blank, signed by him at the time of his proposal as a member of said Catholic Order of Foresters, are hereby

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acknowledged and declared by him to be the warranties and to be made a part of this contract.

"(2) The representations and agreements made and subscribed by him in the application and medical examiner's blanks and the answers given and certified by him to the medical examiner are hereby acknowledged and declared by him to be warranties and to be made a part of this contract.

"(3) The person to whom this certificate is issued shall at the time of his death be a member in good standing of the Catholic Order of Foresters, and shall have complied with all the laws, rules, regulations, and provisions of the constitution and by-laws of the Catholic Order of Foresters and said court at the time of the death of said person.

"(4) The constitution and by-laws governing the Catholic Order of Foresters and the said court at the time of the initiation into the said court of the person to whom this certificate is issued and all amendments, additions, alterations that may be made thereto at any time during the continuance of this certificate at any time prior to the death of said person are declared to be a part of this contract."

After the death of the member, his widow, the plaintiff, began this action, filing a declaration as commencement of suit. The defendant pleaded the "general issue" accompanying the same by a notice alleging:

"(2) That the statements contained in said application were made by Joseph Lessnau for the purpose of securing membership in the benefit fund of the Catholic Order of Foresters.

"(3) That Joseph Lessnau made the statements contained in said application, understanding that defendant relied upon the truth of the same, in considering his application for membership. That the statements of fact contained in said application were in fact warranties upon the truth of which defendant relied in passing upon said application.

"(4) That the statements in said application were not true, but were untrue and false, in the following respects: In said application signed by him Joseph Lessnau stated his occupation to be that of 'dirt wagon driver,' the owner of a team and wagon, and had no regular employer. In reality, at the time of signing said application Joseph Lessnau was earning his livelihood as a professional metal

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or tool polisher. That he followed this calling uninterruptedly during the time of his alleged connection with the Catholic Order of Foresters until his death.

"(5) That, if defendant ever entered into the contract or issued the policy of insurance set forth in plaintiff's declaration, said certificate of insurance was issued only pursuant with and upon the conditions named in the constitution and laws, rules, and regulations of said defendant.

"(6) That the constitution, laws, rules, and regulations of the Catholic Order of Foresters did not provide for the issuing of a certificate to any applying for the same, who was engaged in the trade or occupation of a professional metal or tool polisher. That persons engaged in the work or occupation of professional metal or tool polishers were not eligible to membership in said organization.

"(7) That Joseph Lessnau, knowing this provision in the constitution, laws, rules, and regulations of said defendant, fraudulently represented himself in his application for membership as a driver of a dirt wagon, when, in fact, his occupation was that of a professional metal or tool polisher.

"(8) That Joseph Lessnau was not, according to the constitution, laws, rules, and regulations of the order, eligible for membership in the Catholic Order of Foresters.

"(9) That, if the benefit certificate or policy of insurance relied on in plaintiff's declaration was ever issued by defendant, it was procured by the false and fraudulent representations of Joseph Lessnau.

"(10) That Joseph Lessnau (husband of plaintiff) never was a member of the Catholic Order of Foresters, nor entitled to participate in its benefit fund."

A verdict was directed for the plaintiff.

HOOKER, J. (*after stating the facts*). There is testimony in this case from which the jury might have found, had they been given the opportunity, that, while in his answer to the question accompanying the proposal of his name for membership the deceased stated that he was a "polisher" (which was not necessarily within the term "metal polisher"), he was in fact at that time engaged in the occupation of a "professional metal polisher," a prohibited occupation. Some two months later, when he

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made his formal application, he stated that his occupation was that of "driver of a dirt wagon." There is possibly some testimony, not hearsay, tending to show that at that particular time he drove a dirt wagon for a few days, but it is not very convincing, and, taken in connection with the fact—not disputed, we understand—that a few days later he was engaged in, and continued to follow, his occupation of polishing brass to the time of his death, the jury, had they been permitted, might have found his formal application fraudulent. They should not have been deprived of this opportunity unless there was some valid legal reason for saying that, in spite of the existence of such fraud, plaintiff was entitled to a verdict.

We understand that the learned circuit judge took the view that the required investigation by the local court's committee should have and did put that court in possession of the fact that the deceased was a metal polisher at the time they were called to investigate the proposal for membership, and that, although he later in his formal application misrepresented his occupation, the defendant is estopped and cannot be permitted to deny its liability by reason of the knowledge of the local lodge, and the assumption that it knew of the fact that deceased had stated in the proposal for membership that he was a "metal polisher." It does not appear that the local court ever knew that deceased was a metal polisher. His first statement was that he was a "polisher," and many kinds of polishing were not prohibited. There is no syllable of proof that the committee ever ascertained that he was a metal polisher. Even if they attempted to ascertain a fact to which there was nothing in the proposal to especially call their attention, he may have falsified about it, as he is said to have done in his second application. Nothing goes to show any further knowledge than the contents of the preliminary application afforded upon the part of the local court, or that the proposal was ever returned to the superior body. Again, conceding that deceased's occupation as a metal polisher was known by it,

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the defendant had a right to suppose that, if the deceased had ever followed the prohibited occupation, he had abandoned it, and engaged in an ordinary calling not precluding his admission.

But further than all this, if the deceased's statement when finally made was untrue, and his alleged occupation at that time a temporary expedient to get admitted to the order, he knew that he was making a fraudulent statement or concealment upon which he expected defendant to rely, and upon which it had a right to rely, and, so far as the knowledge of the local court is concerned, this situation would preclude plaintiff from asserting that defendant was bound by the knowledge and collusion of the members thereof if they can be said either to have been defendant's agent or had the knowledge. The case of *Mudge* v. *Supreme Court I. O. F.*, 149 Mich. 467 (112 N. W. 1130, 119 Am. St. Rep. 686, 14 L. R. A. [N. S.] 279), is a case in point, and many authorities are there referred to. To say the least, there was a question for the jury on this point. Some of the cases cited indicate that the doctrines of estoppel and waiver have been greatly overworked in this class of cases in the enforcement of contracts that have not been made, or the evasion of conditions precluding relief, which have been deliberately made by the contracting parties. The recent case of *Showalter* v. *Modern Woodmen*, 156 Mich. 390 (120 N. W. 994), is an authority upon the questions here discussed. What has been said in the present case is not meant to indicate that any knowledge brought to the local court can constitute an estoppel against defendant on this record.

There is another feature of this case that demands attention. Whatever else appears, it is clear that, if—as the court seems to have properly held—the deceased was a professional metal polisher at the time of his death, his policy was rendered void by the change of occupation, if, as contended by plaintiff's counsel, he was bona fide engaged in another occupation when he made his formal application. We are compelled to say that the learned cir-

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cuit judge was right in determining that this defense was not set up in the plea, and no showing was made which requires us to hold that the denial of the motion to amend the notice was erroneous. At the same time, that was a meritorious defense, and an amendment might well have been permitted, and, had it been, we should not have considered it error. It could have been permitted on such terms as would have protected plaintiff, and whether plaintiff would consent to "withdraw a juror or not." There is no reason now why defendant should not be permitted to amend the notice, as the judgment should be reversed, for the reasons indicated. There are some other questions that should be referred to, in view of a possible new trial. The defendant by its pleadings was precluded from questioning the proofs of loss, as shown by the following cases, cited by plaintiff's counsel: *O'Brien* v. *Insurance Co.*, 52 Mich. 131 (17 N. W. 726); *Lum* v. *Insurance Co.*, 104 Mich. 397 (62 N. W. 562); *Douville* v. *Insurance Co.*, 113 Mich. 158 (71 N. W. 517); *Hoffman* v. *Hospital Ass'n*, 128 Mich. 323 (87 N. W. 265, 54 L. R. A. 746); *Hare* v. *Protective Ass'n*, 151 Mich. 225 (114 N. W. 1009); *O'Neill* v. *Assurance Co.*, 155 Mich. 564 (119 N. W. 911).

It was contended by plaintiff's counsel that the proof did not show that the occupation said to have been followed by deceased was that of a "professional metal polisher." We think it established on this record. The judgment should be reversed and a new trial ordered, with direction to permit defendant to amend its notice in the particular mentioned. *Baker* v. *Protective Ass'n*, 118 Mich. 431 (76 N. W. 970); *Browne* v. *Moore*, 32 Mich. 254; *Johnson* v. *Kibbee*, 36 Mich. 269; *Hopkins* v. *Briggs*, 41 Mich. 175 (2 N. W. 199); *Beecher* v. *Wayne Circuit Judges*, 70 Mich. 367 (38 N. W. 322); *Morley* v. *Insurance Co.*, 85 Mich. 217 (48 N. W. 502); *Smith, Sturgeon & Co.* v. *Grosslight*, 123 Mich. 87 (81 N. W. 975).

BROOKE, J., concurred with HOOKER, J.

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MOORE, J. This is an action brought to recover the sum of $1,000 claimed to be due to the plaintiff by reason of the death of her husband, Joseph Lessnau, under a certificate of insurance issued to him. The defendant pleaded the general issue and gave notice that it would show in its defense that the constitution, laws, rules, and regulations in force at the time Lessnau made application for membership in the order provided that no person should be eligible for membership in the order who was engaged in the trade or occupation of a professional metal or tool polisher; that Joseph Lessnau, knowing this, fraudulently represented himself in his application for membership to be a driver of a dirt wagon, having no particular employer, whereas, as a matter of fact, he was actually engaged in such prohibited occupation at the time he made application for membership in the defendant society; that by such application he agreed that all statements made by him with reference to his occupation were true, and defendant relied upon the truth of the same in passing upon said application. In the month of November, 1905, Joseph Lessnau applied for membership in what defendant calls a preliminary application. In this application the deceased gave his employment as that of a polisher. After deceased had been investigated by an investigating committee appointed by the local court, and had been duly balloted upon for membership in the local court, he made a second application, which defendant calls a formal application. This application is dated January 21, 1906. In it Mr. Lessnau stated that his occupation was that of a driver of a dirt wagon, and his place of business at 730 Hancock street, and that he had no employer, and took jobs of hauling dirt, etc. At the time he executed this application he was subjected to a physical examination. The formal application for membership, together with the physical examination, were forwarded to Chicago, and the benefit certificate of insurance sued upon in this action was issued. After both parties rested, the court directed a verdict for the plaintiff. A motion for a

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new trial was overruled, and defendant brings the case here by writ of error.

We quote from the brief of counsel:

"The case presents seven principal questions:

"*First.* Did the court err in not requiring the plaintiff to produce testimony showing that proofs of death were furnished or offered to be furnished?

"*Second.* Did the court err in denying defendant's motion to direct a verdict for the defendant on the ground that there was no evidence to show that the insured was a member in good standing of the Catholic Order of Foresters, nor that he had complied with the rules, regulations, and by-laws provided in the constitution and by-laws?

"*Third.* Did the court err in not permitting the defendant to amend its plea and notice?

"*Fourth.* Should the court have directed a verdict for the defendant?

"*Fifth.* Did the court err in not submitting the case to the jury and giving defendant's requests to charge?

"*Sixth.* Did the court err in not submitting to the jury defendant's five questions of fact?

"*Seventh.* Did the court err in directing a verdict for the plaintiff?"

Groups 1 and 2 may be considered together: Under defendant's plea and notice, the only defense urged is that fraud, misrepresentation, and deceit were practiced by deceased as to his occupation in obtaining the benefit certificate, and for that reason he was never a member of defendant order. (*a*) Under this plea and notice, it was not incumbent upon the plaintiff to show proofs of death. (*b*) Under defendant's plea and notice, it was not incumbent upon plaintiff to prove that deceased was a member in good standing at the time of his death. See *Hare* v. *Protective Ass'n*, 151 Mich. 225 (114 N. W. 1009), and cases cited; *O'Neill* v. *Assurance Co.*, 155 Mich. 564 (119 N. W. 911).

3. Did the court commit reversible error in declining to permit defendant to amend its notice under the plea, so as to show deceased had changed his employment from that of driver of a dirt wagon at the time of his formal applica-

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tion to a prohibited employment at the time of his death? The case was commenced December 27, 1907. The hearing was had in August, 1909. After the plaintiff had made her case, and defendant had entered upon its defense, the following occurred:

"*Mr. Snyder:* Then I will ask leave to amend the plea.

"*Mr. Dohany:* That is objected to, your honor.

"*Mr. Snyder:* Upon what ground? A plea may be amended at any time.

"*The Court:* No question about that. It is entirely within the discretion of the court, but I take it that counsel come into court on one theory.

"*Mr. Snyder:* We are in court on both theories.

"*Mr. Dohany:* They want to ride two horses now. They are not satisfied with riding one.

"*The Court:* The difficulty is here: If this were the plaintiff asking for leave to amend, we could do it very nicely by giving him leave to withdraw a juror and giving the defense an opportunity to prepare. In this case the defense is asking leave to amend their plea, and I think, in view of the fact that counsel have come into court with this plea with eight different notices attached to it, I am inclined to think, it would be an abuse of discretion to permit the amendment at this time, unless counsel for the plaintiff will consent. If the plaintiff will consent to withdraw a juror and giving himself a chance to prepare for this new defense, I will then grant it. I don't believe I can compel the plaintiff to do that.

"*Mr. Dohany:* We certainly could not do that under the circumstances, your honor. * * *

"*Mr. Snyder:* It doesn't seem to be so much a matter of discretion as it does that the amendment should be allowed. I don't think the counsel for plaintiff is taken by surprise in this matter.

"*The Court:* He tells the court that he is, and he is a reputable practitioner, and the court believes him.

"*Mr. Snyder:* I think we should be allowed to amend.

"*The Court:* I will give you the benefit of an exception. Exception for defendant."

It will be observed the case had been at issue a year and a half at this time. It does not appear that any new information as to the facts had come to defendant. The trial was half over. The record does not show such an

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abuse of discretion as to call for the interference of this court. See *Hare* v. *Protective Ass'n*, 151 Mich. 225 (114 N. W. 1009), and cases cited; *O'Neill* v. *Assurance Co.*, 155 Mich. 564 (119 N. W. 911). The record shows that at the time deceased signed the preliminary application in November he was a polisher and buffer. The following appears in section 158 of defendant's by-laws:

"No officer or member of any department or branch of of the order shall have any authority, power or right to represent or act as the agent of the order, except in the performance of the duties specifically imposed upon him by these laws, rules and regulations. * * *"

After the preliminary application was made, it was read at a regular meeting of the subordinate court, and applicant's fee of $2 paid as provided in section 222. The application was indorsed by two members in good standing, as required by section 221. The recording secretary of the subordinate tent appointed two members who investigated deceased's occupation, as required by section 224. This investigating committee recommended the admission of Mr. Lessnau by a written report to the recording secretary. Deceased was thereafter duly elected a member of defendant order as provided in sections 228 and 229. It is not probable, in view of what occurred, that the subordinate court did not know at this time all about the applicant's occupation. When the formal application was made, deceased truthfully stated his occupation. The certificate was issued and deceased paid all that was required of him up to the time of his death. To refuse to pay now does not appeal to our sense of justice. We think the court made a proper disposition of the case. *Wagner* v. *Knights of Honor*, 128 Mich. 660 (87 N. W. 903); *Hoskins* v. *Loan Ass'n*, 133 Mich. 505 (95 N. W. 566); *Dorff* v. *St. Adalbert's Aid Society*, 157 Mich. 516 (122 N. W. 82).

Judgment is affirmed.

BIRD, C. J., concurred with MOORE, J.

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BLAIR, J. I agree with Mr. Justice MOORE. The benefit certificate issued by defendant and containing the agreement of the parties contains the following clause:

"The statements made by said member in the proposition blank, signed by him at the time of his proposal as a member of said Catholic Order of Foresters, are hereby acknowledged and declared by him to be warranties and to be made a part of this contract."

Under this clause, defendant was as much chargeable with notice of the applicant's occupation at the time as though the statements of the proposal blank had been printed *in extenso* in the certificate, and, having received his money, is estopped to claim that such occupation rendered him ineligible to membership. *Dorff* v. *St. Adalbert's Aid Society, supra.* Under its plea, defendant assumed the burden of proving that plaintiff's decedent falsely stated his occupation in the formal application as that of driver of a dirt wagon. The record is barren of evidence that Mr. Lessnau's statement was false at the time it was made, and such evidence as there is tends to support his wife's hearsay testimony that he was in such occupation.

I think the trial judge made a correct disposition of the case, and the judgment should be affirmed.

OSTRANDER, MCALVAY, and STONE, JJ., concurred with BLAIR, J.

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OLNEY v. BROWN.

1. MORTGAGES — DEED AS SECURITY FOR DEBT — TRUSTS — EVIDENCE.
   A deed absolute upon its face may be shown by parol evidence to have been executed as security for a loan from a third party not named in the conveyance; the grantee receiving the title in trust for the real mortgagee.

2. SAME—TRUSTS—DESCENT AND DISTRIBUTION — REAL PROPERTY.
   Where it appeared that a collateral writing was executed by the parties to the deed, reciting the purpose of its execution and stipulating that if the premises conveyed should be sold to satisfy the debt, any balance remaining in the hands of the grantee should be paid to the grantor, or at his option, or in event of his death, to his widow, no trust in the property resulted in favor of the widow after the repayment of the loan by the heirs of the grantor, without a sale of the premises conveyed.

3. ESTATES OF DECEDENTS —ADVANCEMENTS—EXECUTORS AND ADMINISTRATORS.
   It is not an advancement for a parent to loan money to certain of his children and take their notes in payment.

4. SAME—DESCENT—REAL PROPERTY—ADVANCEMENTS.
   Nor is the right of such children to take an interest in real property of their father impaired by their unpaid indebtedness to the estate, upon the notes.

5. SAME—ADVANCEMENTS—EVIDENCE.
   Oral testimony is inadmissible to prove an advancement not evidenced by writing or a declaration of intent, as required by 3 Comp. Laws, § 9072.

6. SAME.
   It is not permissible to adjust the indebtedness of a part of the children, so evidenced, to the estate, by depriving them of their legal estate in lands of the deceased and giving their interest to other heirs.

Appeal from Kent; McDonald, J. Submitted January 14, 1910. (Docket No. 157.) Decided November 11, 1910.

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Bill by Kittie Olney, William J. Bowne and Charles A. Bowne against William T. Brown, Burdette L. Bowne, Beatrice Bowne, and Sarah J. Bowne to enforce a trust. From a decree for complainants, defendants appeal. Affirmed.

Clement Smith (*Fred W. Walker* and *William W. Potter*, of counsel), for complainants.

Kingsley & Wicks (*Philip T. Colgrove*, of counsel), for defendants.

HOOKER, J. Andrew J. Bowne was a wealthy banker in Hastings and Grand Rapids. The complainants are the children of himself and his first wife, who was divorced from him at Hastings. Sarah Bowne, a defendant, is his widow, and Burdette and Beatrice Bowne are their children. The connection of defendant Brown with the case will appear as the facts are stated. He was an early friend at Hastings. In 1893 Bowne, being then in financial distress, appealed to A. G. Spalding & Bros. of Chicago, a concern that Bowne had aided in the early days of their business by heavy loans, for assistance, and they loaned him $20,000. The matter was arranged by Brown, who was a member of that firm. Bowne proposed to give them security, which Brown declined to take at first, but Bowne insisted, and Bowne and wife gave him (Brown) a deed of a homestead, the title to which stood in Mrs. Bowne, and a parcel of platted land in Grand Rapids, owned by Bowne. The testimony shows that Bowne's design was to give this land to Brown in trust as security for the loan and as a protection to his wife and her two young children, who were minors. It was arranged that Brown should put the terms of the agreement in writing to be signed by him and sent to Mrs. Bowne, and this was done as soon as Brown received the deed by mail. This came to the hands of Mrs. Bowne, and was seen and approved by Bowne, and it was kept by his wife. It was

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afterwards lost, but a substantial, if not exact, copy appears in the record, which is as follows:

"CHICAGO, June 23, 1893.

"Within deeds received this date, deeded to me in trust for A. G. Spalding & Bros., who have advanced $10,000 and agree to advance more to Mr. Bowne.

"Should it ever become necessary for A. G. Spalding & Bros. to use this security it is agreed by me that the balance that could be received above the amount loaned by A. G. Spalding & Bros. should be paid to Mr. Bowne, or in case his option or his death, to Mrs. Sarah J. Bowne for her use and that of her children, Burdette L. Bowne and Beatrice Bowne.

"These deeds are not to be recorded, excepting as a last resort, and then only for the protection of the parties at interest, viz.: A. G. Spalding & Bros., and Mrs. Sarah J. Bowne and her two children as above stated.

"Chicago, June 23, A. D. 1893.

[Signed] "WILLIAM T. BROWN.

"Signature witnessed by

"FRED H. ANDRUS."

Previous to Bowne's embarrassment, he had furnished considerable money to his three children, the complainants, for much if not all of which he took their respective notes. It is unnecessary to state the amounts so furnished; it being sufficient to say that they were large enough to exceed their respective claims in this suit. Bowne died in 1896, and his estate was settled, and the administrators were discharged. His debts were paid, including the debt to A. G. Spalding & Bros., but there was little, if any, residue, after payment of the allowances to the widow and the expenses of administration. Our understanding is that nothing was received by the children, nor was any effort made to collect the notes given by the several complainants, none of which were barred at the time probate proceedings were commenced. It is our understanding that they were uncollectible and were inventoried at a nominal sum. The final account was allowed and estate closed on May 19, 1905. No request was made by the complainants or any representative of theirs that

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the administrators should list the lands deeded to Brown, but a request was made by their counsel to Brown that he turn over the lands to the estate. Soon after Bowne's death, and on the 15th day of September, 1896, Brown executed an instrument reciting the loan to Bowne by A. G. Spalding & Bros., the execution of the deed, the notes given for the loan and their renewals, and concluding as follows:

"Now, therefore, know all men by these presents that I, the said William T. Brown, formerly of Chicago, Illinois, now of Chicopee Falls, Massachusetts, do hereby declare that the two deeds above mentioned were executed and delivered to me for the following purposes: 1st. To secure the payment to said A. G. Spalding & Bros. of said loan of money and the interest thereon and of said notes and the renewals thereof, together with the interest thereon, given by said Andrew J. Bowne, to evidence said indebtedness as aforesaid, and also to secure the payment of all taxes which might be paid on said lands by said A. G. Spalding & Bros., and all other expenses and charges which they might be put to or sustain for or concerning said lands. 2nd. It was understood and agreed and said Andrew J. Bowne directed and charged me to pay and convey to said Sarah J. Bowne the lands above described, or the proceeds thereof or whatever might remain thereof after paying in full the lien and claim which said A. G. Spalding & Bros. had or might have on said lands as aforesaid. 3rd. I hold said lands under said conveyances in trust for the purposes aforesaid, and, whenever the lien and claim of A. G. Spalding & Bros. shall have been fully paid and satisfied, I am willing to convey said lands or the proceeds thereof in my hands to whomsoever shall be legally entitled thereto.

"In witness whereof, I have hereunto set my hand and seal this 15th day of September, A. D. 1896.

"WILLIAM T. BROWN. [L. S.]

"Signed, sealed and delivered in the presence of

"HOWARD L. HOLT.

"F. D. HOWARD."

This was acknowledged and recorded on the 3d day of February, 1907. We are unable to see that the rights of the parties were in any way affected by this act of Brown.

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The bill was filed to compel Brown to deed the premises to the five children, subject to the dower interest of the widow. Upon the hearing the bill was dismissed as to Charles A. Bowne, who has not appealed. The defendants have appealed from a decree in favor of the other complainants.

The deed from A. J. Bowne to Brown was in form an absolute one. It was competent for Bowne or his heirs to show that it was not such in fact by showing that it was security for a debt. This appears from the parol testimony which was competent to prove it. It also appears by the instrument executed at the time of the delivery of the deed, stating that Brown received it in trust for A. G. Spalding & Bros., with authority to sell if necessary, to pay the debt, and hold the balance in trust to be paid to Bowne or to the widow on the happening of either of two events: (1) The exercise of his (Bowne's) option; (2) his death.

The only theory upon which it can be said that this deed created more than a mortgage interest is that, the deed and declaration of trust being contemporaneous, the title was wholly divested from Bowne, and through the declaration of trust a vested interest in the land lodged in Mrs. Bowne under the statute. [3 Comp. Laws, § 8831.] Some interesting questions suggest themselves in this connection, but they need not be discussed, for the reason that these instruments cannot be construed to create such interest in the widow. The deed on its face purported to convey an absolute title. It is clear that its primary object was to secure the existing and prospective claims of Spalding & Bros., and as to them was at most a mortgage, possibly in trust, being in the name of Brown. It is plain that a sale by Brown was contemplated, but only in case it was necessary. If not necessary, there was no agreement by him to deed the premises to the widow. Presumably on payment of the debt to Spalding & Bros., Bowne would, under the law, have been entitled to a re-

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conveyance. The debt was paid by his heirs, and they, standing in Bowne's shoes, would be entitled to the same. If it could be said that the deed and declaration were effective to create a trust in favor of Mrs. Bowne and her children, which we do not decide, it was conditioned upon the necessity of a sale of these premises, and was to pay money if any remained. It was not to sell if unnecessary nor to convey the land to her if it was unnecessary to sell it to pay the claim of Spalding. The alleged trust related to a contingent fund to arise from a mortgage sale, if one should be necessary. There has been no fund, and there can be none, as the estate was used to pay the secured debt, which was thus extinguished.

It is claimed that these complainants have received more than their share of the estate by advancements, and it was so held as to one of them, and the bill was dismissed as to him. This is a question that Brown is not interested in, but is one that the heirs have seen fit to litigate in this forum, and the decree, not having been appealed from, is final as to Charles Bowne. The other four children were held to be entitled to a conveyance from Brown of the premises in dispute, which we understand should not and does not include the homestead, which was properly reconveyed to the widow.

We have examined the question of advancement with reference to the other two older children. We fail to find any evidence of an intent on the part of Bowne to distribute a portion of his estate (see *In re Simon's Estate*, 158 Mich. 260 [122 N. W. 544]) to these children. He simply lent them some money, taking and keeping alive the notes given therefor to the time of his death. See *Sprague* v. *Moore*, 130 Mich. 99 (89 N. W. 712). These notes were inventoried as part of the estate, and are still outstanding unless barred by the statute or probate proceedings. The right of these parties to take interests in land by descent is not affected by their indebtedness to the estate. *Marvin* v. *Bowlby*, 142 Mich. 245 (105 N. W. 751, 4 L. R. A. [N. S.] 189, 113 Am. St. Rep. 574);

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Broas v. *Broas*, 153 Mich. 310 (116 N. W. 1077). Counsel for defendants contend that the intent that these loans should be treated as advancements should be inferred from the circumstances and subsequent declarations of Mr. Bowne. Our statute is an answer to that claim. See 3 Comp. Laws, § 9072. Counsel concede that this statute is rigid in prescribing the rule of evidence. See *Power* v. *Power's Estate*, 91 Mich. 587 (52 N. W. 60). Similar statutes have been so construed elsewhere. Thus in *Barton* v. *Rice*, 22 Pick. (Mass.) 508, it was held that under the statute of Massachusetts (of which our statute is a literal copy) oral testimony was inadmissible. Referring to the statute, the court said:

"Oral testimony is clearly inadmissible to prove an advancement, which must be proved in the manner prescribed in Rev. Stat. chap. 61, par. 9. That provides:

"'That all gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant.'

"The statute does not expressly declare that an advancement shall not be proved in any other manner, but that undoubtedly is the meaning of the statute."

See, also, the following cases in point cited by complainant's counsel: *Filman* v. *Filman*, 15 Grant's Ch. 643; *Shepherd* v. *White*, 10 Tex. 72; Mass. Gen. Stat. chap. 91, § 8; *Hartwell* v. *Rice*, 1 Gray (Mass.), 587; *Bigelow* v. *Poole*, 10 Gray (Mass.), 104; *Ashley, Appellant*, 4 Pick. (Mass.) 24; *Osgood* v. *Breed*, 17 Mass. 358; *Bullard* v. *Bullard*, 5 Pick. (Mass.) 527; *Bulkeley* v. *Noble*, 2 Pick. (Mass.) 340; *Porter* v. *Porter*, 51 Me. 376; *Weatherhead* v. *Field*, 26 Vt. 665; *Adams* v. *Adams*, 22 Vt. 51; *Newell* v. *Newell*, 13 Vt. 24. We must hold that these loans were not advancements.

The argument that the evidence shows that the parties (decedent and complainants) understood and intended that the loans should be equalized in the division is but an-

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other way of asking us to treat the loans as advancements. Had the notes been put in judgments and levied on the shares in the land of the judgment debtors, their respective interests might have been reached, but the inequity in the present situation (and it seems to us that there may be one) cannot be adjusted by depriving complainants of their legal estates in land and giving them to others.

We are constrained to affirm the decree of the learned circuit judge, with costs, against all defendants except Brown.

MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

STEELE *v.* KELLOGG.

1. FRAUD—SUBSCRIPTION TO CORPORATE STOCK—REPRESENTATIONS OF THIRD PERSON.

   While statements of fact, made by a person who was not acting for the defendant or associated with him as principal, are not a proper subject of comment in the opening statement of counsel, under a declaration for fraud of the defendant in inducing plaintiff to subscribe for corporate stock, such reference was not error when the statements referred to were shown on cross-examination by the defendant's counsel, in sustaining his theory of the defense.

2. SAME—SUBJECT-MATTER.

   That the alleged representations related to a business owned by one who was not interested in the venture, would not affect plaintiff's right to recover, where the corporation to which he subscribed projected the taking over of a part of such business, to which the representations related, and the defendant was to profit by the transaction.

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3. SAME—INTENT.
Proof of oral representations similar in character to those alleged in the pleadings, made by defendant to third parties, was competent as having a tendency to show fraudulent intent.

4. SAME—EVIDENCE.
A letter written after plaintiff had concluded the agreement, having a tendency to negative the defense that the alleged untrue statements were inadvertently made, was admissible.

5. SAME—VALUE—OPINION EVIDENCE.
Opinion evidence was properly received to show the value of corporate stock that had no market value, and was not the subject of sale.

6. SAME—RELIANCE ON REPRESENTATIONS.
Where it was claimed that defendant wrote a letter to an intermediary with whom plaintiff dealt, and that plaintiff read the letter and acted in reliance on it, the question whether plaintiff had agreed to subscribe before he saw the letter was a material issue.

7. SAME.
Whether or not defendant understood that the plaintiff had already subscribed for the stock was material in determining his intent in writing the letter which contained the false statements.

8. EVIDENCE—CORRESPONDENCE.
A witness was properly allowed to explain what he meant by stating in a letter that he had agreed with plaintiff relative to the subscription.

9. DAMAGES—FRAUD AND DECEIT—STOCK.
Instructions to the jury which permitted the jury to find, as damages, the difference between the actual value of the stock and the value it would have had if it had been as represented, not exceeding the amount paid for it, were not prejudicial to defendant's rights.

10. SAME—INTEREST.
Where money is obtained by fraud and deceit interest may be added as compensation.

11. NEW TRIAL—WEIGHT OF EVIDENCE.
The denial of a new trial is *held* to be sufficiently supported by the weight of the evidence.

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Error to Calhoun; North, J. Submitted April 15, 1910. (Docket No. 69.) Decided November 11, 1910.

Case by William H. Steele against John H. Kellogg and Will K. Kellogg for fraud and deceit. Judgment for plaintiff; defendant Will K. Kellogg brings error. Affirmed.

George W. Mechem and *Henry B. Graves*, for appellant.

Arthur B. Williams and *Sam A. Mitchell*, for appellee.

OSTRANDER, J. Plaintiff filed his declaration June 5, 1908, against John H. Kellogg and Will K. Kellogg, defendants, alleging in the first two counts of the declaration that he was induced to purchase the shares of stock in a corporation by the fraud and deceit of both defendants, and, in the last two counts, that said fraud and deceit was practiced by the defendant Will K. Kellogg. The plea was the general issue. At the trial, at which the first two counts of the declaration were withdrawn, the plaintiff recovered a verdict and judgment against the defendant Will K. Kellogg for $9,442.27. There was a motion for a new trial, which was denied. It is alleged in the declaration, and these are the essential allegations in both the third and fourth counts thereof: that the defendant Will K. Kellogg, prior to October 22, 1906, being an owner of certain so-called proprietary food preparations known as Peptol, etc., etc., and anxious and desirous of disposing of said proprietary food preparations and formulas for making the same, had negotiations with one Charles D. Bolin to secure either the sale of said food preparations to said Bolin or to secure his co-operation in bringing about a sale: that said Bolin was entirely unacquainted with the nature and character of said food preparations and what had been accomplished previous thereto in reference to the sale of them, except as he was

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informed and advised in reference thereto by said defend ant, and said Bolin had no means of information, and no information was given to him with reference to the preparations, salability, and what had previously been accomplished in the sale of them, except as he was advised and informed by the said defendant: that such negotiations were had that the said Will K. Kellogg claimed to have an option from John H. Kellogg so that the preparations and the formulas for making the same could be purchased for the sum of $20,000 in cash, and thereafter negotiations were had with the said Bolin by the said Will K. Kellogg to the end that said Bolin was to procure stock subscriptions to be paid for in cash among his business acquaintances and friends in the city of St. Louis, and a corporation was to be formed with a capital stock of $100,000, to which corporation the right to manufacture said food preparations and the formulas was to be transferred or to be caused to be transferred by said Will K. Kellogg or John H. Kellogg, or both of them, upon the payment of the said sum of $20,000.

"That said Will K. Kellogg, in order to bring about the sale of the right to manufacture said food products and the formulæ for the manufacture of the same, as aforesaid, in which food products and the right to manufacture the same the said Will K. Kellogg had, to wit, a one-quarter interest, entered into a scheme to bring about such sale, and to that end and purpose misrepresented the facts and deceived the plaintiff herein in reference to said food products and their salability, and in reference to what had been previously done and accomplished in reference to the sale thereof. That the said Will K. Kellogg, in carrying out said scheme, represented and stated verbally to the said Charles D. Bolin, at the said city of Battle Creek and elsewhere, that the sales upon Peptol, one of said food preparations, as carried on at the said city of Battle Creek by the said John H. Kellogg or by said Sanitas Nut Food Company, Limited, or by said Will K. Kellogg, or by some or all of them, had earned a net profit of from 12 to 15 per cent. per year on $100,000. And in further representing to said plaintiff what had previously been accomplished in reference to the sale of said Peptol, and

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that on such sales there had been earned a net profit of from 12 to 15 per cent. per year on $100,000 (meaning thereby during the year then next preceding the date of the letter next hereinafter referred to) under date of September 27, 1906, at said city of Battle Creek, wrote to the said Charles D. Bolin a letter, which letter was in words and figures as follows, to wit:

"Sept. 27, 1906.

"CHAS. D. BOLIN,

"Louisville, Ky.

"*Dear Friend:* I have yours concerning Peptol. I do not want to appear obstinate or stubborn, but after giving the matter considerable thought, I do not feel inclined to donate any of my $15,000 block of Peptol stock to Mr. Steele, and if the deal is to fall through for the reason that I will not comply with Mr. Steele's demand, I think we will have to let it go. I have an option from the Dr. for his Peptol business. If obliged to do so, I can pay the Dr. October seventh for his option, $20,000 worth of Corn Flake stock, two for one. I will do as much for Dr. Davis as either yourself or Mr. Clague, but I have the impression that Mr. Steele should be satisfied with what you have already offered him. If the deal is to be called off, kindly wire me promptly on receipt of this, at my expense. Papers are already being executed by the attorneys, but we can go ahead and organize it with Battle Creek people, without the assistance of a large amount of capital. The business which is already established is paying 12 to 15 per cent. on $100,000. If necessary to do so, I can handle the deal on my own account, without the assistance of any one; however, would like to have you in it, as I am confident it will be a money maker. With kind regards and best wishes, I am,

"Very truly yours,

"W. K. KELLOGG."

"And in which letter above referred to the said defendant, Will K. Kellogg, among other things, reiterated the aforesaid statements and representations in reference to the sales upon Peptol and the earnings thereof, previous thereto, by the use of the following language:

"'The business which is already established' is paying 12 to 15 per cent. on $100,000.'

"And the said Will K. Kellogg in further carrying out the said scheme at said city of Battle Creek wrote to the said Charles D. Bolin a letter under date of October 1, 1906, which letter was in words and figures as follows, to wit:

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"'October 1, 1906.

"'Mr. CHARLES D. BOLIN,
"'St. Louis, Mo.

"'*Dear Mr. Bolin:* I have just had a long distance message from Stanley Clague. He tells me that the Peptol matter is in the air and that if I do not submit to the assessment of a thousand dollars made on me for the benefit of Mr. Steele by next Tuesday that the whole thing is off, so far as you are concerned. All that I have to say, Mr. Bolin, is that I shall be satisfied with your decision if it is to be that way. Peptol is already making good money. I have an option from J. H. K. which I can manage myself and the company is practically organized; and to meet the attorney this afternoon at three to finish and complete the papers, and we are all ready to go ahead and do business. I at the present time own one-quarter interest in Peptol. I can readily take up on Dr. Kellogg's option by giving some of my Corn Flake stock as collateral to note and in case I do this and become the entire owner of all that pertains to Pan-Peptogen, Peptol and Maltol I am sure that my interest would be worth at least $50,000. Peptol is better than it has ever been before, we are getting good results and are getting good repeat orders. Last night about half-past eight, while at my home, I had a telephone call. The party gave his name as Calvert. He said he was a postal clerk at the office, and called me up about a special delivery letter he had just received from St. Louis, Mr. Dodd. I asked to have the letter sent up. Remembering the young man as one to whom I had given some Peptol to try, I asked him how he was getting along. Mr. Frank Calvert stated that he had gained sixteen pounds since he began using Peptol and that his wife had also gained. Calvert had always been one of the lean, long and lank kind, and never before in his life had he been able to make any gain; in fact, for some years he had been gradually losing. If Peptol will do this for Calvert and wife, it will do the same thing for hundreds of others. Unless I hear from you by telegram Tuesday night, I shall consider the deal is off, and so far as you and I are concerned, I am at perfect liberty to go ahead and operate Peptol as I see fit. I am sending this letter special delivery to insure its reaching you in time for the telegram. I shall not be in the least offended if you decide to throw the proposition down.

"'Yours very truly,
"'W. K. KELLOGG.'

"And in which letter last above referred to the said Will K. Kellogg, among other things, reiterated the aforesaid statements and representations in reference to the sales upon Peptol and the earnings thereof, previous thereto, by the use of the following language: 'Peptol is

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already making good money' (meaning thereby 12 to 15 per cent. on $100,000 during the year previous thereto). That the said representations and statements made verbally by the defendant herein as above stated, and as contained in the letters written by him to the said Bolin as aforesaid, were made in accordance with, and in carrying out, the scheme of the defendant as aforesaid, and were made for the purpose of having such representations and statements used by the said Bolin in soliciting stock subscriptions for such proposed corporation; and the said Will K. Kellogg, at the time of making such representations and at the time of writing such letters and thereafter, well knew that such representations and statements so made by him as aforesaid were to be used by the said Bolin in soliciting stock subscriptions for such proposed corporation, and such representations were made by said Will K. Kellogg, he having knowledge in reference thereto superior to that of said Bolin and of this plaintiff, and superior to the knowledge of this plaintiff when he subscribed for the stock herein mentioned and paid the money herein referred to, said Will K. Kellogg, then and there, knowing such representations to be false and untrue, and said Will K. Kellogg made such representations for the purpose of deceiving and defrauding this plaintiff and any others who were to be solicited to buy the capital stock of said corporation as herein set forth."

It is alleged that Bolin related and restated to plaintiff and others whom he solicited to purchase stock in the proposed corporation the statements made by the said Will K. Kellogg in reference to the earnings from said Peptol, stated that it was proposed to form a corporation with a capital stock of $100,000 to take over the manufacture of said food preparations as aforesaid, and exhibited to plaintiff and others the said letters which are above set out; that the plaintiff read the letters, and, having no other means of information, believed the statements therein and those given to him by the said Bolin in reference to the earnings from Peptol, and, relying solely thereon, subscribed for capital stock of the Peptol Company; that the said statements and representations of said Will K. Kellogg so made verbally and in and by the said letters were untrue and false, in that the earnings upon the manufact-

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ure and sale of Peptol previous to September 27, 1906, had not been from 12 to 15 per cent. per year upon $100,000, and the business which had been already established was not paying 12 to 15 per cent. on $100,000, but, on the contrary, the net earnings upon the manufacture and sale of said Peptol had been limited, if they were anything at all, and the said Peptol was not then already making good money as alleged.

Upon the trial the plaintiff gave the following testimony:

"*Q.* Now, I want you to tell the jury what led and induced you and what you relied upon in making this investment of $8,625.

"*A.* Nothing in the world except the statements of W. K. Kellogg in his letters. That was a thorough guaranty. I refer to the letter of September 27 and October 1, 1906."

Facts admittedly established by the testimony are: The Sanitas Nut Food Company, Limited, of Battle Creek, Mich., manufactured a large number of food preparations and was practically owned by Dr. John H. Kellogg, who held all but two shares of its stock. The defendant Will K. Kellogg was its manager under an agreement, by the terms of which he received one-fourth of the net profits. One of the food preparations manufactured by this company was Corn Flakes, a business which was afterwards, and prior to the year 1905, taken over by a corporation called in the record the Corn Flake Company. Among other foods manufactured by this company were products known as Pan-Peptogen, Maltol, and Peptol; the latter product being put on the market under that name some time during the year 1905. Mr. Charles D. Bolin, of St. Louis, Mo., was to some extent acquainted with all the foods that were made by the Sanitas Company and was a stockholder in the Corn Flake Company. He and W. K. Kellogg had been acquainted for a number of years. These two gentlemen had some talk, and later some negotiations, concerning the organization of a separate company to manufacture and develop the sale of the

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other products above named. These began late in 1905, or early in 1906. Both were parties to the negotiations with Dr. Kellogg, having for their purpose the securing of an option for the formulas and the right to manufacture and sell the said products. On or about October 5, 1906, an agreement in writing was entered into between the Sanitas Company and Dr. John H. Kellogg, parties of the first part, and Will K. Kellogg, party of the second part, by the terms of which, and for the sum of $20,000, there were purchased and sold the formulas, secret processes, trade-marks, and good will attached to the aforesaid foods. The corporation, named the Peptol Company, was organized under the provisions of Act No. 232, Pub. Acts 1903, of Michigan, with a capital of $100,000, divided into 10,000 shares for the purpose of manufacturing and selling proprietary foods; the articles of association being acknowledged October 22, 1906, and the incorporators being Bernard J. Onen, Vera Sloan, and Eric E. Covert, of Battle Creek, who subscribed in all for 5,000 shares of the stock. To this company, on November 1, 1906, Will K. Kellogg assigned all of his right, title, and interest in and to the contract which has been mentioned. Mr. Charles D. Bolin undertook to interest one or more parties in the corporation about to be organized. He did interest, among others, the plaintiff, who subscribed and paid for stock to the amount of $8,625. Plaintiff also received as a bonus—that is to say, he did not pay for—300 shares of the stock. Defendant Will K. Kellogg, Bolin, and a man named Clague received, without payment of money therefor, shares of stock in the new company. The letters set out in the declaration were written by defendant Will K. Kellogg. The statement concerning earnings, appearing in the letter of September 27, 1906, was untrue. The principal issues of fact left to be determined by the jury were whether this statement was, as claimed, inadvertently written, whether it was written to be shown to or read by the plaintiff and others to whom it was desired to sell stock, whether it was shown to or read by plaintiff, and

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whether plaintiff had before seeing or reading it definitely concluded to take stock in the proposed new corporation. Upon each of these there was conflicting testimony.

The jury was instructed, generally, that plaintiff, in order to recover, must establish:

"(1) That the false representation was made by the defendant relative to a material fact; and in that connection I say to you that a representation as to the earning capacity of the Peptol proposition, viz., that it earned 12 to 15 per cent. on $100,000, would be a material representation.

"(2) He must show that the false statement was made knowingly or in reckless disregard of the truth by the defendant.

"(3) That it was made with intent to deceive the plaintiff, or a class of people to whom the plaintiff belonged, and to induce the purchase of stock in the Peptol Company.

"(4) That the plaintiff relied upon and has been deceived and defrauded by such misrepresentation, and not having knowledge of its falsity or such knowledge as would put a reasonably careful person upon his guard relative to that matter."

They were further instructed that if these facts were established the measure of plaintiff's damages would be—

"The difference between what the plaintiff's investment in Peptol stock, viz., $8,625, actually was worth, and what the value would have been had these representations upon which the plaintiff claims to have relied been true; but, in determining what the value of this Peptol stock would have been had these representations been true, for the purpose of this suit you cannot find its value to exceed the amount paid by the plaintiff, viz., $8,625, because there is no proof in this case which would make the stock of greater value than this amount. With this limitation in mind, you should determine what the value of the stock purchased by Mr. Steele, which was of the par value of $11,630, was at the time he bought the stock in the Peptol Company; and the difference between this and what would have been the value of this stock had the representations been true as established by the evidence in this case (and this I have said cannot exceed $8,625, the amount paid by the plaintiff), plus simple interest at the rate of 5 per cent. per annum on this difference from

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the date of November 5, 1905, would be the measure of the plaintiff's damages. I realize the fact, gentlemen, that this statement is somewhat involved. I am unable to make it plainer; but, perhaps to repeat, it is true that if the plaintiff has any right to recover at all in this case you should determine on the one hand what his holdings would have been worth if the representations made by Mr. Kellogg upon which the plaintiff relied were true; in other words, you should determine what the $11,630 par value of this stock would have been worth if Mr. Kellogg's representations had been true, but you cannot fix that value in excess of the amount the plaintiff paid for it, because there is no testimony in the case which will justify such a finding. So the greatest amount which you can find to be the value of the stock he purchased, in the event that the representations had been true, would be $8,625. But you may find it under the evidence to be less than that. If you do, you should subtract from the amount that the stock would have been actually worth had the representations been true (not to exceed $8,625), you should subtract from that what you find his stock was worth at the time he purchased it and the difference with 5 per cent. simple interest per annum would be the measure of his recovery."

With this statement we proceed to notice some of the alleged errors. We have already disposed of many of the contentions of defendant in saying that upon each of the issues above referred to the testimony was conflicting. We are satisfied that none of them should have been decided by the court. As to others, we follow, substantially, the order in which they are presented in argument.

1. In the opening statement made by the attorney for plaintiff, he said:

"We will show by Mr. Bolin that in this conversation with the Doctor which occurred in the month of July or August, 1906, the Doctor made a statement in reference to what Peptol had already been doing in the way of making money and earning money, and the Doctor stated to Mr. Bolin at that time, as I recollect, that Peptol was already earning something like $15,000 a year."

Here an objection was interposed, the substance of it being that, as Dr. Kellogg was not a party (plaintiff hav-

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ing voluntarily elected to proceed upon the last two counts of the declaration), any representation made by him was not binding on Will K. Kellogg. The court permitted the statement to proceed, and the attorney for plaintiff, continuing, said:

"In that conversation Dr. Kellogg said many things in reference to what Peptol had been doing, and said to Mr. Bolin that Peptol was already earning in the neighborhood of $15,000 a year for the sale of Peptol as it had been previously carried on by the Sanitarium. Mr. Bolin made inquiry of Dr. Kellogg why he was so anxious to sell if it was earning so much money, and the Doctor said it was a preparation that was claimed to make thin people fat, and he wanted to get out of that kind of business because it was hurting his standing with the medical profession, and his influence and standing at the Sanitarium."

Plaintiff was the first witness called, and he was asked:

"*Q.* Now, in the fore part of September, 1906, did Mr. Bolin repeat to you anything that W. K. Kellogg or Dr. Kellogg had stated about the Peptol matter?

"*A.* Yes, sir."

An objection was interposed to the effect that any representation made by Dr. Kellogg was hearsay and immaterial, and the court sustained the objection. Later, on cross-examination of Bolin by defendant, he stated that Dr. Kellogg had intimated to him that Peptol was making good money and was doing well, and that he (Bolin) had informed plaintiff that the Doctor had told him it was earning $15,000 to $20,000 a year. No objection was interposed and no motion made to strike out the testimony. It was not competent, for the purpose of connecting Will K. Kellogg, to prove representations made by Dr. Kellogg. And there was, apparently, no excuse for referring to any such representations in the opening statement of counsel. But in view of the cross-examination of Bolin, which was conducted to sustain a theory of defense to the action, it would manifestly be improper to reverse the judgment because of the opening statement of counsel.

2. It is urged that testimony of oral representations

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made by Will K. Kellogg to Bolin, although alleged as ground of recovery, could not furnish a proper basis of recovery because:

(1) They concerned the credit and financial standing of a business owned by Dr. Kellogg, or by the Sanitas Nut Food Company.
(2) They were not relied upon by plaintiff.

Motion to strike out the testimony was denied. In this connection may be considered the objection that statements made prior to September 27, 1906, by Bolin to plaintiff concerning the earnings of the business, were not admissible because it was not made to appear that Will K. Kellogg was responsible for such statements. A motion to strike out this last-mentioned testimony was denied upon the promise of counsel for plaintiff to prove that Will K. Kellogg was responsible for these statements, a promise which it is said was not redeemed. The record discloses that Mr. Bolin was a witness without whose testimony the plaintiff must have failed in the suit. It is his testimony which is relied upon to prove that the letter of September 27, 1906, was written to himself for the express purpose of being shown and read to possible purchasers of stock to induce them to become purchasers; that it was a cunning device to attract any one by whom it should be read. Without his testimony the letter is, for the purposes of the plaintiff, an innocent document. While Bolin's complicity in the scheme, if there was a scheme, does not relieve the defendant, it is nevertheless apparent that in permitting plaintiff to detail oral representations made to him by Bolin, and in permitting Bolin to detail oral representations made to him by Will K. Kellogg, opportunity was afforded to Bolin to exculpate himself, if he was not an innocent agent. It seems to us now, after the trial, that if the plaintiff had been required to rely upon the letter, which he says determined his action, upon the falsity of the representation therein contained and upon the testimony of Bolin to the effect that the letter was written for the purpose of inducing purchases of

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the stock and was exhibited for that purpose, the real case for plaintiff would have been better presented. But it was the theory of the defendant that the letter was not written with a fraudulent purpose and was not in fact relied upon by plaintiff, and that what plaintiff did rely upon was oral representations made to him by Bolin and Clague before the letter was written. Proof of oral representations similar in character to those stated in the letter, made by Kellogg to Bolin, or to others, would have probative value in determining whether the statement in the letter was knowingly and fraudulently made. So all testimony which tended to prove that Bolin knew that the statement in the letter was untrue also tends to prove that there was no reason for repeating the statement to him in correspondence and supports in some degree the inference that the letter was designed to be shown to others. The objection that Will K. Kellogg was not connected substantially with the oral statements claimed to have been made by Bolin to plaintiff is not sustained by the record. Whether or not, if they were made, they were relied upon by plaintiff, they were confirmed, in substance, by the letter of September 27th. The legal objection which was made is without merit because it is clear that Will K. Kellogg was to profit out of the contemplated venture.

3. The letter of October 1st was properly admitted in evidence, since it tended to negative inadvertence or mistake in making the representation contained in the letter of September 27th.

4. The witness Bolin, over the objection that he was not qualified to do so, was permitted to testify to the value of plaintiff's stock at the time it was purchased. This ruling is assigned as error. He gave an opinion because no one could do more than that. Defendant also gave his opinion; no objection being made. The value of the opinions was for the jury. The stock had no market value. It was not the subject of sale. No error was committed.

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5. Whether plaintiff had agreed with Bolin or Clague or either of them to take stock in the corporation before he read the letter of September 27, 1906, was material, and it was material, also, whether defendant believed or understood that he had done so at the time the said letter was written and sent out. Correspondence relating to the attitude of plaintiff passed between Kellogg, Bolin, and Clague. It is not claimed that anything in this correspondence was brought to the attention of plaintiff; but as affecting the credibility of Bolin, who testified that no agreement to take stock had been reached before September 27th, and that plaintiff finally concluded to take stock October 30th, some of the correspondence was supposed to be material.

One of the letters excluded was written September 23, 1906, by Clague to Bolin, and was answered by Bolin under date September 29th. Confronted with the Clague letter and his reply thereto, Bolin was permitted to tell what he meant by language employed in his letter. It is said this was error. It will be remembered that when these letters were written no arrangement had been concluded with the Sanitas Nut Food Company, or with Dr. Kellogg. A proposition that Clague, Bolin, and defendant should each give to plaintiff $1,000 par value of stock proposed to be taken by them in the new company had been agreed to by Bolin and Clague but not by defendant. In his letter of September 23d Clague appears to charge the blame for nonconclusion of the principal arrangement to Bolin, who replied (September 29th):

"I cannot agree with you that I am holding up the Peptol proposition; the situation is just like it was when you left St. Louis. I told you when you were here that in order to get Mr. Steele in we would have to give him $8,000 worth of stock for $5,000. You and I agreed to give him $1,000 of our stock and leaving the other $1,000 for Mr. Kellogg to give. We then told Mr. Steele what we would do and he accepted our terms. That left the proposition up to Mr. Kellogg. Now he refuses to accept our terms and the Doctor has raised the price from

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$18,000 to $20,000. I suppose if the matter drags a little longer they will raise it to $50,000. Allow me to say that I am not going to make any more concessions; if they want the deal closed on the terms already agreed upon between you and I and Doctor Kellogg's last proposition to sell for $20,000 and take our note for $6,500 we will accept the proposition, if not, so far as I am concerned, you can count me down and out. I note further that you state that Peptol is a good proposition; if I did not think so, I would not of course, gone into it. But I cannot afford to give my time to selling the stock and promoting the company unless I am well compensated. I have written Mr. Kellogg a letter plainly stating that the proposition was up to him and unless he accepted it as proposed, that we would drop further negotiations. I appreciate the fact that you were willing to sacrifice part of your interest to close the deal and as you know I was willing to do the same thing. I think the Kelloggs are making a good thing out of the deal; they know about what they are doing or they would not sell. I have told Mr. Kellogg all along that I would not go into the deal unless Mr. Steele went into the proposition with me. We always make investments of all kinds together and I regard his judgment in these matters as first class and he would make one of the best directors we would have in the company. Unless Mr. Kellogg accepts this proposition by Tuesday and not later than Wednesday the whole deal will be a closed incident so far as I am concerned, as Mr. Steele has already notified me that he has other matters pending which he wants to close and that I must give him an immediate answer. * * *

"P. S. I really feel Mr. Kellogg and Dr. J. H. Kellogg should let this deal be consummated as agreed by you and I with Mr. Steele. We made a definite agreement with him and it is not in good faith for us to break our agreement with him. What shall I say to him? I cannot afford to put myself in such a position again with him, he would lose faith in me and he would have a good reason for so doing."

On September 29, 1906, Bolin also wrote to defendant, and in the letter he says:

"I have a letter from Mr. Clague this morning in which he intimates that I am holding up the deal. I am sorry that he looks on the matter in that light as I am do-

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ing nothing of the kind. It is up to Mr. W. K. Kellogg to accept the terms which Mr. Clague himself agreed to while in St. Louis."

In a postscript the following is added:

"Mr. Clague and I felt sure you would do this and so agreed with Mr. Steele and immediately notified you, or at least Clague said he would. Your refusal to accede to our agreement puts us in an uncomfortable position with Mr. Steele. We definitely agreed to accept his proposition and I am at a loss to know what to say to him. I have made one or two trips to try and close this deal. After all our trouble with the Doctor it falls through for a pittance."

His explanation of this postscript is that he meant by the words "and so agreed with Mr. Steele" that he had agreed in a tentative way and had in fact only a conditional understanding with plaintiff, who was demanding "something more definite." Whatever one may think of the explanation made by this witness, we know of no rule of evidence which refuses a witness the right to explain what he has written, or has stated orally, in correspondence with others. As to the excluded letter, written by Clague, nothing in it adds to or takes from the apparent force and effect of the correspondence which was received in evidence.

6. Plaintiff retains his stock in the corporation. His action is for damages for fraud and deceit. He paid $8,625 for his stock and received therefor stock of the par value of $11,630. Of this, $3,000 worth of stock, at par, was, according to his testimony and contention, bonus stock. Verdict was rendered December 18, 1908, and if the jury had found the stock to be worthless when purchased, and if they followed the instructions given them by the court, the accrued interest would have amounted to about $898. The jury in the verdict added $817.27 to the amount of the original investment. It is said that the charge permitted the jury to consider the difference between the actual value and the represented value of $11,630 of stock, and that error was thus committed. As

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the court also charged the jury that if the representations had been true the stock could have no greater value than the amount paid for it, it is evident that defendant was not prejudiced. Clearly, the actual value of 1,130 shares would be greater than the actual value of 863 shares.

It is contended further that it was error to instruct the jury to add interest to the difference in value as determined by them. Compensation is what the law means to award in such a case, and although it has been sometimes said that the jury *may* add interest—that it is discretionary—the general rule appears to be that where money is obtained by fraud and deceit its recovery, with interest, is compensation. 14 Am. & Eng. Enc. Law (2d Ed.), pp. 189, 190; *Snow* v. *Nowlin*, 43 Mich. 383, 387 (5 N. W. 443).

7. The assignments of error not herein specifically referred to have been considered. We think most of the contentions made with respect to them are answered by the record and we find no occasion for discussing them. We are not convinced, in view of the nature of the controversy and of the benefit likely to be derived from seeing and hearing the witnesses, that the court below ought to have set aside the verdict as contrary to the weight of evidence.

As we are unable to say that error was committed at the trial, the judgment is affirmed.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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PEOPLE *v.* BROTT.

1. APPEAL AND ERROR—CRIMINAL LAW — SAVING QUESTIONS FOR REVIEW.

   Except as a matter of grace, where it is apparent that an injustice has been done, the Supreme Court will not, on appeal, reverse a conviction for an omission to charge the jury as to a point not presented by any request to charge, nor brought to the attention of the trial court by exception.

2. SAME—MOTION TO QUASH.

   On a motion to quash, first presented after a jury has been sworn, based on the ground of want of testimony before the examining magistrate, no error was committed in refusing to discharge the respondent.

3. SAME—BURGLARY—STATUTES.

   A conviction upon a charge of burglary, under 3 Comp. Laws, § 11547, will not be reversed for failure to charge the jury that they must find, in order to convict the accused, that the building which he entered was not adjoining to or occupied with a dwelling house; the evidence being clear upon the point, no request to charge covering it having been offered and no dispute as to the matter having been raised on the trial. BLAIR, J., dissenting.

Error to Osceola; Sessions, J., presiding. Submitted April 21, 1910. (Docket No. 134.) Decided November 11, 1910.

Walter Brott was convicted of breaking and entering in the nighttime, a store not adjoining to or occupied with a dwelling house, with intent to commit larceny. Affirmed.

Howard F. Withey, for appellant.

Fred Trumbull, Prosecuting Attorney, and *John E. Bird*, Attorney General, for the people.

HOOKER, J. The defendant was convicted upon a

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valid information charging him with breaking and entering in the nighttime a store "not adjoining to or occupied with a dwelling house," with intent to commit the crime of larceny.

The testimony was abundant that the store was not adjoining to nor occupied with a dwelling house, and there was no testimony to the contrary, and there was no request to charge that it was essential that the jury investigate or find the fact as charged. It is contended in this court, apparently for the first time, that the testimony left the fact in doubt. We think otherwise, and the court might properly have so informed the jury.

The learned circuit judge instructed the jury as follows:

"In this case the people charge these respondents, Walter Brott and Fred Compton, together with Henning Hammer, with having on the 29th day of March last, in the nighttime, broken and entered the store of Walter Budge, with the intent then and there to commit the crime of larceny; that is to say, to steal, take, and carry away, and to convert to their own use, some of the property of Mr. Budge, then situated in that store. You will observe that there are several elements or ingredients in the offense charged against these respondents, and to warrant a conviction in the case you must find: (1) That these respondents did break and enter, or did assist in breaking and entering, the store of Walter Budge. (2) That the breaking and entering was in the nighttime, and that at that time they had the intent to commit the crime of larceny; that is, to steal some of the property in that store."

Error is assigned upon this charge upon the ground that it omits an essential element. It is urged, in support of this assignment, that it is the duty of the trial judge to instruct the jury regarding all essential elements of the case, and that this court should reverse a conviction although no request was made nor exception taken. We may concede the duty, without admitting the alleged consequence. We might perhaps (but do not) even say that the charge was erroneous in this particular without also admitting a right to reversal. The contention of the

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defendant involves the proposition that there is a class of irregularities in the trial of a case which are exceptional in this: that as to such a defendant has a *right* to a review and reversal, without an exception, aside from those upon which the statute permits assignment of error, without exception, such as errors upon misstatements in the charge.

This court has often held that it will not review questions that have not been raised in the trial court, and such is the rule according to the great weight of authority. In *Driscoll* v. *People*, 47 Mich. 414 (11 N. W. 225), a case of homicide, Mr. Justice CAMPBELL, said:

"No specific instructions were asked, * * * and the court cannot be held to have erred in not giving them, so long as the charge actually given was not misleading."

This case was quoted and approved in *People* v. *Willett*, 105 Mich. 117 (62 N. W. 1115). In *People* v. *Waller*, 70 Mich. 239 (38 N. W. 262), a larceny case, error was assigned on the failure to define a "reasonable doubt." The court held that, not having requested it, the question would not be reviewed. In *People* v. *Warner*, 104 Mich. 337 (62 N. W. 405), a forgery case, we refused to review the omission to explain the meaning of the words "false and forged," and the failure to instruct that the fact that defendant did not testify was not evidence of guilt, for the reason that the respondent's counsel did not call the attention of the trial court to these points. In *People* v. *Smith*, 106 Mich. 434 (64 N. W. 200), counsel claimed a reversal on the ground that the court should have directed a verdict in a case of assault with intent to murder. We held that the point was made too late, not being raised in the trial court. In *People* v. *Gray*, 135 Mich. 544 (98 N. W. 261), we refused to consider questions when no exceptions had been taken. In *People* v. *Carter*, 117 Mich. 577 (76 N. W. 90), the defense was made that defendant was so drunk as to have been incapable of having an intent to murder. The omission of instruction on the point was held not error; no request having been made.

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In *People* v. *Raher*, 92 Mich. 167 (52 N. W. 625, 31 Am. St. Rep. 575), the omission to instruct that defendant, charged with assault with intent to do great bodily harm, might be found guilty of assault and battery, was held not cause for reversal; no request having been made. In *People* v. *Prinz*, 148 Mich. 307 (111 N. W. 739), we held that "the general rule in criminal as well as civil cases is that this court will, on review, consider *only* such questions as were presented for the consideration of the trial court." In 12 Cyc. p. 808, it is said to be "a general and almost universal rule that questions not raised at the trial will not be reviewed," citing many cases from the various State courts, among them some Michigan cases. See, also, 13 Cur. Law, p. 193 *et seq.* In 12 Cyc. p. 820, it is said that "in most jurisdictions the improper refusal or neglect of the court to charge on a particular point, or its action in granting and giving improper instructions, will not be reviewed on appeal unless specially excepted to on the trial, and this rule applies to instructions given by the court of its own motion," citing cases from 18 different States, and *contra* the single State of Michigan, the following cases: *People* v. *Murray*, 72 Mich. 10 (40 N. W. 29); *People* v. *Macard*, 73 Mich. 15 (40 N. W. 784); *People* v. *McGuire*, 89 Mich. 64 (50 N. W. 786). See, also, 12 Cyc. pp. 658, 815.

We have already attempted to show that the decisions of this court are not at variance with the general proposition, by citing some of its cases overlooked in the note to 12 Cyc. The same authority (viz., 12 Cyc. p. 820) proceeds as follows in the text:

"An exception to this rule is made, however, *in some States in capital cases*, and an improper instruction will be reviewed if *it appears to have prejudiced the accused*, although no exception was taken."

Several cases from Illinois, New York, and other States admit this exception, which, it should be remarked, is sometimes based upon statutes (see *State* v. *Heinze*, 66 Mo. App. 135), or, as in this State so far as it applies,

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upon the Constitution. It is fair to say that this is not always so, and there is some confusion on the subject; but we think the general rule in this State is in conformity to the text first quoted from Cyc. We will now discuss the cases from Michigan which are cited in Cyc. as "*contra.*" They are three, as already stated, and counsel for the respondent has not cited them.

The first in chronological order is *People* v. *Murray*, 72 Mich. 10 (40 N. W. 29). This was a capital case, *i. e.*, rape, and therefore is within the limits of the exception. SHERWOOD, C. J., said:

"While this court cannot reverse a judgment or set aside the verdict upon a review of the facts, when such facts have been properly submitted to a jury, and will not ordinarily depart from such rules of practice as have been adopted as the result of the longest experience, yet, under the general superintending power and control over all inferior courts, and their proceedings, given under the appellate jurisdiction of this court, I have no doubt, in a criminal case, upon a review of all proceedings had which have resulted in the conviction of a respondent, if the court can see that a fair trial has not been had, and it is made manifest that injustice has been done, it then becomes the imperative duty of the court, with or without objections and exceptions by the respondent's counsel, to set aside such proceedings, and order a new trial; and we all think the present presents such a case."

It will be seen that the general rule is recognized, and so far as the adjudication goes the exception is limited to capital cases, "in which *the court can see that a fair trial has not been had and it is made manifest that injustice has been done*," and it declares the duty of this court under its power in such cases.

The next case was *People* v. *Macard*, 73 Mich. 15 (40 N. W. 784), also a capital case, *i. e.*, murder. In that case the court had charged that the jury must find that all of the material facts were proved beyond a reasonable doubt. It was held, in an opinion by SHERWOOD, C. J., that this was not sufficient, although no exception had been taken.

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The third case was *People* v. *McGuire*, 89 Mich. 64 (50 N. W. 786), a case of burglary. It was reversed upon the ground that the charge omitted certain instructions which were properly requested, though it was claimed that no exception was taken. It related to a crucial question, and the course taken was held "manifestly prejudicial." Upon the authority of the two earlier cases already discussed, the writer of the opinion said:

"We have heretofore held that the neglect of the court in criminal cases to properly charge the jury upon a material point could be taken advantage of without an exception on the trial."

The Michigan cases relied upon by counsel for defendant are: *People* v. *Bielfus*, 59 Mich. 576 (26 N. W. 771); *People* v. *Dowell*, 136 Mich. 306 (99 N. W. 23); *Liebler* v. *Carrel*, 155 Mich. 199 (118 N. W. 975); *People* v. *Prinz*, 148 Mich. 307 (111 N. W. 739). In *People* v. *Bielfus*, the question was properly raised in the trial court. We presume it was cited for the remark that "in such a case justice requires that no element of the crime shall be left out of sight," a palpable truth injected into the opinion as a reason for reversal on a question properly raised below, and open in this court. Justice requires in all cases that the trial shall in all respects conform to legal rules, but reversal does not ordinarily follow where an appellant omits to give the trial court information of his claim in relation to questions subsequently raised. The case is not in point. The same may be said of *People* v. *Dowell*, *supra*, when Mr. Justice GRANT wrote the opinion. It does not show that the question upon which it was reversed was not properly raised below. *Liebler* v. *Carrel*, *supra*, was not a criminal case and we do not discover that it sustains complainant's proposition. *People* v. *Prinz*, *supra*, did not pass upon the question of the want of exceptions. The case was a capital case, and the last enunciation of this court upon the subject.

A case earlier than any of those discussed is that of *People* v. *Maunausau*, 60 Mich. 15 (26 N. W. 797). It

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was a case of larceny and was reversed by an opinion written by Mr. Justice MORSE, upon the ground that the court admitted the statements of a codefendant and neglected to state to the jury, in connection with the giving of said testimony or in the charge, that it could not bind the appellant. No reference was made to it, no request to charge was made, nor was an exception taken. The opinion says:

"It was manifestly error to receive the evidence without cautioning the jury, as aforesaid, not to use the admission of one against the other. * * * The error lies in not instructing the jury as to its use."

The opinion continues:

"The question now arises whether the counsel for respondents, by their failure to request such instruction, or to except to the failure of the court to do so without request, have waived their clients' rights in the premises. The objection made to the reception of this evidence, though not as clearly stated as it might have been, was evidently aimed at the injustice as well as the incompetency of using the declarations of one of these respondents against the other. It was the plain duty of the trial judge, when he received this testimony, or when he instructed the jury, to clearly point out the bearing of these admissions upon the vital issue of guilt or innocence, and to forbid, as far as he could, the use of the declarations of Richard to convict Samuel, or the admissions of Samuel to prejudice the case against Richard. In a criminal case all doubts should be solved in favor of the accused, and in the present case, when the evidence of the respondents' guilt depends almost entirely upon these declarations, we consider the neglect of the court to properly confine this testimony within its lawful limit as an error too grave to be overlooked, and one entitling the defendants to a new trial."

It is probably safe to say that this case goes much further than any other case that can be found in the books, but it shows that it was a most important point in the case. The opinion states that it was a case of "petit larceny." The property was charged to be worth $6, and three months was the limit of imprisonment under the

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law. No authority was cited in support of it, and it is a significant fact that the case was not cited in the later cases. It is also worthy of mention that the writer of that opinion, in a later case, affirmed a conviction in which the cases of *People* v. *Murray* and *People* v. *Macard* and *People* v. *Maunausau* were much weakened, if not practically overruled. The offense was a heinous one. *People* v. *Graney*, 91 Mich. 646 (52 N. W. 66). It was followed in an opinion by LONG, J., in *People* v. *Smith*, 92 Mich. 11 (52 N. W. 67), and again in *People* v. *Ostrander*, 110 Mich. 63 (67 N. W. 1079).

Referring now to the cases from other States upon which defendant's counsel rely, we find nothing in *Goldsberry* v. *State*, 66 Neb. 312 (92 N. W. 906), to satisfy us that the question may not have been raised below. The same may be said of *McDow* v. *State*, 113 Ga. 699 (39 S. E. 295), while an exception was taken in *State* v. *Fulford*, 124 N. C. 798 (32 S. E. 377). In *Falk* v. *People*, 42 Ill. 331, it was held that, where incorrect instructions are given, the appellate court will refuse to pronounce a sentence of death and will order a new trial, though exceptions are wanting. In *McMillan* v. *State*, 35 Tex. Cr. R. 370 (33 S. W. 970), the court said that it would not reverse the cause unless the error were calculated to injure appellant's rights. This was a capital case and was affirmed. In *People* v. *Barberi*, 149 N. Y. 257 (43 N. E. 635, 52 Am. St. Rep. 717), the court held that:

"An erroneous statement of the law in the charge * * * or improper comments upon facts or the evidence bearing upon them may be reviewed and corrected in the court of appeals in a capital case, without any exception, when it can be seen that they may have operated to the prejudice of the accused."

Our decisions are undoubtedly in line with the general rule regarding the necessity of exceptions, etc., and this court is also committed to the exception stated in Cyc., already quoted. One or more of our cases have applied the exception to other than capital cases, but all have been

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cases where serious injury had been done to defendant's rights, in the opinion of the appellate court. It is a significant fact that in none of these cases have other authorities been cited, and, as we have seen, the most extreme cases have been questioned, and therefore it might perhaps be said that there is no impediment to holding that the exception is limited to capital cases, where it is clear that manifest injustice has been done. Of the latter proposition we are satisfied and can dispose of this case upon that ground.

It is clear from this record that the defendant has suffered no injustice on the question raised:

(1) Because it is clear that the store was within the statute.

(2) Because there is nothing to indicate that it was a disputed question upon the trial, or that it was not tacitly taken as a conceded fact in the case.

(3) Because the jury found defendant guilty as charged, and there is no presumption, nor is there any proof, that the jurors did not find the element of the offense said to have been omitted.

The defendant is relying upon a technical claim which we feel fully justified in disregarding, in view of the manifest justice of the verdict. We adhere to the general rule that questions will not be reviewed unless raised in the court below, and brought here in accordance with the general practice, for to hold otherwise would enable defendants to raise most any question without exception. There is much good sense in the strictest rule upon this subject, and certainly to extend it beyond the exception mentioned, as intimated in *People* v. *Farrell*, 146 Mich. 291 (109 N. W. 440), where advantage was sought upon technical grounds, would be to put a premium upon a practice of treating a point as inconsequential, or conceded, and thereafter asking a reversal, upon the ground that it has been overlooked, thus allowing a defendant to have an "anchor to windward" in case he shall fail of acquittal on the merits. If it be admitted that this court has

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this power, and on occasion will exercise it, in a capital and even in other cases, it should be done only when the record clearly shows that a manifest injustice has been done; but this should be held as in the nature of an act of grace, wherein the noncompliance of counsel with the rules of practice is overlooked, rather than a recognition of a defendant's right to disregard the rules and practice usually required to assure justice to the State in the prosecution of offenders. See *People* v. *Graney*, 91 Mich. 646 (52 N. W. 66). Being satisfied that substantial justice has been done in this case, we must decline to reverse it upon this technical ground, in the absence of a request and exception if we should in such case reverse it, which we do not decide.

There are other questions in the case; but they require no extended discussion. The motion to quash for want of testimony before the justice on the examination was properly overruled. Upon that question, also, the magistrate was permitted to act without his attention being called to this claim, which was first raised at circuit after the jury was sworn, and when a discharge on a technical point might be final, by reason of defendant's having been in jeopardy. We have examined the remaining questions and find in them nothing that requires a reversal.

The judgment should be affirmed.

OSTRANDER, MOORE, MCALVAY, BROOKE, and STONE, JJ., concurred with HOOKER, J.

BLAIR, J. Respondent was arrested and examined upon a complaint and warrant charging him and three others with breaking and entering in the nighttime the store of one Walter Budge, not adjoining to or occupied with a dwelling house, with intent to commit larceny. At the examination of respondent, no proof was offered that the store was not adjoining to or occupied with a dwelling house. Respondent was bound over for trial at

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the circuit court for the offense charged, and an information was filed for that offense; respondent refusing to plead. A plea of not guilty having been entered by order of the court, respondent moved to quash the information, for the reason, in substance, that there was no testimony produced before the justice or returned by him tending to show that the store was not adjoining to or occupied with a dwelling house, as required by section 11547, 3 Comp. Laws. The motion was overruled, and at the close of the case the respondent was convicted, and has appealed to this court.

The principal points relied upon for a reversal are:

First, that the court erred in overruling the motion to quash.

Second, that the court erred in defining the offense in his charge to the jury by omitting to include therein as an element the location of the store with reference to a dwelling house.

First. Technical nicety would have been better served by presenting evidence as to the location of the store with reference to other buildings; but where the respondent presents no request to the examining magistrate for his discharge upon that ground, and it does not appear that his rights were prejudiced, we think justice requires that he should not be permitted to raise the question after the return has been filed and an information presented charging the same offense as the complaint and warrant. The complaint specifically informed the respondent of the precise offense of which he was charged, and, manifestly, the matter of prime importance to him was the proof upon which the people relied to connect him with the breaking and entering of the store with larcenous intent. The proof was ample upon both these elements and furnished all of the information which respondent needed for the preparation of his defense. We think the motion was properly overruled.

Second. The court instructed the jury, as to the elements of the offense, as follows:

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"In this case the people charge these respondents, Walter Brott and Fred Compton, together with Henning Hammer, with having on the 29th day of March last, in the nighttime, broken and entered the store of Walter Budge, with the intent then and there to commit the crime of larceny; that is to say, to steal, take, and carry away, and to convert to their own use, some of the property of Mr. Budge, then situated in that store. You will observe that there are several elements or ingredients in the offense charged against these respondents, and to warrant a conviction in the case you must find:

"'(1) That these respondents did break and enter, or did assist in breaking and entering, the store of Walter Budge.

"'(2) That the breaking and entering was in the nighttime, and that at that time they had the intent to commit the crime of larceny; that is, to steal some of the property in that store.'"

No reference was made in any part of the charge to the necessity of finding that the store was not adjoining to or occupied with a dwelling house. It is argued by the counsel for the people that this was error without prejudice, since the undisputed testimony showed that the store was not adjoining to or occupied with a dwelling house. The record supports the contention of counsel as to the testimony on this point being all one way, and there can be no doubt that, if the attention of the jury had been called to the necessity therefor, they would have found that the store was not adjoining to or occupied with a dwelling house. But the question which presents itself to us is: Have the jury found by their verdict that the store was not adjoining to or occupied with a dwelling house? As shown by the quotation from the charge, the court, in stating to the jury what the charge against respondent was, excluded this element, and, in stating what the jury must find from the evidence, he again eliminated this element. It would seem to necessarily follow that the verdict of the jury convicted the respondent of breaking and entering the store of Walter Budge in the nighttime, with intent then and there to commit the crime of

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larceny. The verdict, therefore, did not convict the respondent of the offense with which he was charged in the information, nor of any offense known to the law. *Koster* v. *People*, 8 Mich. 431.

The judgment should be reversed, and a new trial granted.

DIEL *v.* KELLOGG.

1. PLEADING—DECLARATION—JOINDER OF COUNTS.
   The filing of a plea to a declaration for fraud waives the objection that certain counts alleged fraud against one defendant and other counts against two defendants.

2. SAME—TRIAL—ELECTION.
   An election should be required on defendant's motion to determine on which counts plaintiff would proceed.

3. SAME—DISMISSAL AGAINST ONE DEFENDANT—ELECTION.
   Error in failing to require such election was cured by plaintiff's dismissal, at the close of his testimony, of his case against one of the defendants, no bad faith being apparent.

4. SAME—EVIDENCE—FRAUD.
   Nor was the admission of testimony concerning representations made by the defendant as to whom the action was dismissed, prejudicial to the other defendant, in view of the charge of the court which withdrew that evidence from the consideration of the jury.

5. FRAUD—STOCK SUBSCRIPTIONS.
   Where plaintiff subscribed to stock of a corporation because of alleged false representations contained in a letter from defendant to a promoter of the enterprise, and communicated to the plaintiff, representing falsely that the product to be manufactured had been earning 12 to 15 per cent. on a capitalization of $100,000, the letter was admissible in evi-

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dence, although defendant claimed it was written for another purpose, and that the promoter was not authorized in using a single and material sentence, apart from its context, which, however, did not appear to qualify the effect of representations made.

6. SAME—SUBSEQUENT STATEMENTS.
The repetition of the alleged fraudulent statements in a subsequent letter had a tendency to refute defendant's claim that the representation was an inadvertence or mistake.

7. SAME—EVIDENCE—OTHER TRANSACTIONS.
Evidence that the promoter, to whom defendant wrote the letter, used it to procure other subscriptions to stock of the corporation, was properly received to establish a fraudulent intent and the complicity of the promoter.

8. EVIDENCE—VALUE—STOCK—OPINION TESTIMONY.
It was competent to show the value of stock in a project that failed, by the opinion of one of the interested investors who was familiar with the enterprise.

9. FRAUD—STOCK—DAMAGES.
Plaintiff was entitled to recover for stock which he bought after his original subscription, where the evidence tended to show that it was treasury stock, although another party had promised to take it, and, without paying for it, indorsed the certificates over to plaintiff, who paid the amount to the managing stockholder.

10. EVIDENCE—ADMISSIONS.
A conversation of a witness with defendant, which might, though not necessarily, tend to show a sense of obligation consistent with plaintiff's claim, was competent evidence.

11. SAME—HEARSAY—CORPORATE REPORTS.
Reports of business of a corporation, not supported by sworn testimony as to their correctness, are hearsay.

12. SAME.
The form in which defendant furnished information concerning the business of another corporation was not material.

Error to Calhoun; North, J. Submitted June 16, 1910. (Docket No. 162.) Decided November 11, 1910.

Case by Herman Diel against Will K. Kellogg and

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John H. Kellogg. Judgment for plaintiff against defendant Will K. Kellogg, who brings error. Affirmed.

George W. Mechem and *Henry B. Graves*, for appellant.

Arthur B. Williams and *Sam A. Mitchell*, for appellee.

HOOKER, J. The defendant has appealed from a verdict and judgment for $4,400 against him in an action on the case for fraud and deceit.

An outline of facts as stated in defendant's brief, apparently undisputed, is that Dr. Kellogg of Battle Creek was owner of a formula for an alleged fat inducing food, which he used in three food preparations; the same being manufactured by the Sanitas Nut Food Company, a corporation, and he being practically its owner, as he owned all but two shares of its stock. His brother, W. K. Kellogg, managed the concern, for which he received one-fourth of its net profits. A scheme was devised with a view to organizing a corporation to purchase this business and all of the rights of Dr. Kellogg therein and in the formula for $20,000. One Bolin of St. Louis, Mo., and W. K. Kellogg, were active in this, also a man named Clague of Chicago, and it was proposed to sell stock in the concern. Bolin was to sell $30,000 of the stock, and to receive $15,000 from the treasury stock for his service. W. K. Kellogg was to receive $15,000 of the stock, and upon certain conditions $5,000 more, for his interest in the old company and services. Bolin resided in St. Louis and sold certain shares of stock in the new company to the plaintiff, and, the business not proving successful, the plaintiff brought this action, alleging that the two Kelloggs had represented to Bolin that the Sanitas Nut Food Company had earned a net profit of 12 to 15 per cent. per year, on $100,000, and that for the purpose of inducing the purchase of stock said W. K. Kellogg had written a letter to Bolin, in which he said:

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"The business which is already established is paying twelve to fifteen per cent. on $100,000."

With the expectation and intention that the statement should be used by Bolin to induce the purchase of stock by plaintiff and others; and that said statement was communicated to him, the plaintiff, by Bolin, and he was thereby fraudulently induced to purchase certain treasury stock, and afterwards certain other stock that had been previously sold to another person. The declaration contained four counts. The first two charged fraud and deceit upon both Kelloggs and claimed damages against both; the last two charged fraud and deceit and claimed damages against W. K. Kellogg only.

At the beginning of the trial, counsel for the defendants asked that the plaintiff's counsel be required to elect whether they would proceed under the first two counts against both defendants or under the last two against Will K. Kellogg alone. This motion was denied, and the plaintiff's counsel proceeded with the testimony. Bolin, who was plaintiff's main witness, testified to conversations with both Kelloggs in which oral representations were made by each in the absence of the other to the effect that the Sanitas Nut Food Company was doing a profitable business. Bolin also said that Dr. Kellogg stated that one of said food preparations, Peptol, was earning $15,000 to $20,000 a year. These, however, he did not communicate to plaintiff. Bolin also testified that Dr. Kellogg referred him to W. K. Kellogg for a definite statement of the exact earnings, and he (Bolin) asked Dr. Kellogg to have his brother insert in a regular business letter what the earnings were, so that he could show it to prospective purchasers of stock, and that he afterwards said to W. K. Kellogg:

"Mr. Kellogg, you understand in organizing a company—I want you to fix this just as you did with the Corn Flake Company, when we organized that. You want to write me a business letter and give in that let-

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ter the earnings so that I can show the people what they are buying, what business they are going into.

"And he promised to get the earnings and give it to me in a letter."

In this connection, we insert Exhibits 3, 4, and 5; Exhibit 5 being the one relied on as containing the fraudulent statement by W. K. Kellogg:

"September 21, '06.

"Mr. CHARLES D. BOLIN,

"c/r of J. W. Thatcher & Co. and General Delivery, Toledo and

"c/r of the F. E. Nelson & Co. and General Delivery, Columbus, Ohio—

"*Dear Mr. Bolin:*

"After I left you Thursday night, the Doctor walked part way home with me and we continued the conversation for half or three quarters of an hour. The result is as follows:

"The Doctor agreed (positively this time) to accept twenty thousand dollars for his entire right and interest in Peptol, formulas, etc., for $13,750 of this amount to be paid in cash when the company is organized, and the company's note for the balance, $6,250, payable in six months. The company is not to pay royalty.

"I think we are now on a basis where we can get together and do business quickly. Am writing Clague.

"My last proposition to the Doctor is what brought him to time. When I suggested turning over to him all my interest and letting him manage the deal to suit himself, he accepted, but later decided he wished me to continue to represent him in the company. I refused to act on the board of the company or have anything to do with the concern except to get it organized. The Doctor suggested one or two other parties whom he might have represent his interest, and I told him all right, to go ahead and fix things up to suit him, but after some lengthy and heated discussion the Doctor asked if I thought the company would pay him $20,000 in cash and he release his claim on royalty, and I told him I was quite sure they would. I feel quite confident that you, Mr. Clague, and all parties concerned will approve of the arrangement.

"Just as soon as I can hear from you and Mr. Clague and know that everything is O. K. and satisfactory, we

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will proceed to organize the company and get to doing business right away quick.

"Yours very truly,

"W. K. KELLOGG.

"WKK F

"P. S. I believe I shall object to the assessment of a thousand dollars mentioned by you for Mr. Steele. I think you ought to be able to manage this matter in some other way and have so advised Mr. Clague."

"Exhibit 4:

"Columbus, Ohio, Sept. 24, '06.

"*Dear Mr. Kellogg:*

"Yours concerning Pan Peptogen at hand, I do not think the Doctor should raise his price. You will recall having said to me you thought $10,000 enough, and he once put $18,700 and now he wants $20,000, he made a great mistake in doing this. I still think $18,700 is all we should give and that you should retain your stock. I would not want to go into it unless you did. The success must be made and it is a great undertaking. However, if Mr. Clague is willing, I am, to pay him his last price. I hope his last figures are final. Mr. Steele must be taken care of as agreed. We cannot put through the deal, I am willing to pay Mr. Steele 1,000. Clague is willing to pay 1,000, and it is up to you. I do not want to go into the deal without him, he is a valuable man, and a brainy man. Let me know if you are willing. Will expect letter at Cincinnati, O., on this subject.

"Yours truly,

"C. D. BOLIN.

"To Mr. W. K. Kellogg."

"Exhibit 5:

"Sept. 27, 1906.

"CHAS. D. BOLIN,

"Louisville, Ky.

"*Dear Friend:*

"I have yours concerning Peptol. I do not want to appear obstinate or stubborn, but after giving the matter considerable thought I do not feel inclined to donate any of my $15,000 block of Peptol stock to Mr. Steele, and if the deal is to fall through for the reason that I will not comply with Mr. Steele's demand, I think we will have to let it go. I have an option from the Doctor for his Peptol business. If obliged to do so, I can pay the Doctor

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October seventh for his option $20,000 worth of Corn Flake stock, two for one. I will do as much for Dr. Davis as either yourself or Mr. Clague, but I have the impression that Mr. Steele should be satisfied with what you have already offered him. If the deal is to be called off, kindly wire me promptly on receipt of this, at my expense. Papers are already being executed by the attorneys, but we can go ahead and organize it with Battle Creek people, without the assistance of a large amount of capital. The business which is already established is paying 12 to 15 per cent. on $100,000. If necessary to do so, I can handle the deal on my own account, without the assistance of any one, however, would like to have you in it, as I am confident it will be a money maker.

"With kind regards and best wishes, I am,

"Very truly yours,

"W. K. KELLOGG."

Bolin's testimony as to the transaction with the plaintiff contains the following:

"Receiving the letter of September 27, 1906, marked Exhibit 5, terminated my trip, and I immediately went home to St. Louis. I got the subscriptions. I used the word 'subscriptions.' I got the people to agree to go into it. There never was any written subscription taken by me. I used the letter to raise the money. I called this letter to the attention of Mr. Diel, the plaintiff in this suit. Up to that time I had not opened this matter at all with Mr. Diel. I saw him in what is called the vegetarian restaurant on Pine street. It was where the Sanitarium foods were sold in St. Louis. I said: 'Mr. Diel, I have a proposition for you that is the best that I know of. I asked you to go into the Corn Flake deal and you did not. Now I have another one of the Kellogg propositions that is paying 12 to 15 per cent. already, and if you want to take some stock in it you can get in.' And I reached in my pocket for the letter, and Mr. Diel says: 'Well, what is that?' I said: 'It is Peptol.' I took the letter out of my pocket. I said: 'The business already established is paying 12 to 15 per cent. Here is Mr. Kellogg's letter to that effect.' Mr. Diel said he would like to go in, but he didn't have the cash just then, but would have it later on. I said I could get the money for him. He said all right he would take $3,000 of the stock in the company. I started to hand

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him the letter, and he said: 'That's enough, you have the letter?' And I said: 'Yes, I have the letter. Here it is for you to read.' 'Well,' he says, 'I will take $3,000 in the company on that basis.' He said he had previously been a patient there. He knew the standing and reputation of the Kelloggs and of the Sanitarium. He said: 'That is sufficient. I will take the stock.' Later on he took $1,000 additional stock, making his subscription $4,000. I think that was in November. It was some of the stock, as I remember, that had been issued, and a gentleman wanted to put his money in something else just about the time it came. Mr. Diel took that additional $1,000. * * * The last $1,000 of the stock that Mr. Diel took was subscribed for by a man by the name of Saunders. The certificate was issued in the name of Mr. Saunders, but it was never delivered to him. He never paid anything on it. He indorsed the assignment of the certificate, and a certificate was reissued to Mr. Diel. The stock was sent to me in St. Louis with a draft attached drawn by Mr. W. K. Kellog. I paid the draft. I paid all of Mr. Saunders' subscription—I mean what he had agreed to take. I had no written subscription for the stock from Mr. Saunders. I simply had his word."

At the close of the testimony introduced on behalf of the plaintiff, his counsel voluntarily discontinued the case against Dr. Kellogg, and elected to proceed on the last two counts against W. K. Kellogg.

The foregoing outline of the case may be supplemented in some particulars in connection with the various assignments of error, which will be referred to in the order in which the defendant's counsel have discussed them in the brief.

1. **Election of Counts.** It is unusual to include in a declaration counts charging one defendant only and other counts charging two defendants. But a plea was filed, and, if the joinder was objectionable, the technical point was waived. The plaintiff should have been required to elect, however. *Strawbridge* v. *Stern*, 112 Mich. 19 (70 N. W. 331). At the close of his testimony, his counsel announced "that he dismissed his suit as to

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John Kellogg and elected to stand on the last two counts only of his declaration." This they had a right to do, and we do not discover that any objection was made to it. Counsel for defendant charge bad faith, and an attempt to prejudice the jury, by introducing the statements of Dr. Kellogg, which would have been inadmissible had the election been made at the beginning of the trial. We are of the opinion that bad faith and sharp practice are not so obvious as to warrant a reversal on this ground, and we also think that the testimony was not injurious, in view of the charge of the learned circuit judge, who instructed the jury to disregard it. Moreover, the case was submitted upon the statements of W. K. Kellogg alone, which seem to have been the only ones that were communicated to the plaintiff. It is highly improbable that any statements of Dr. Kellogg influenced the jury. That W. K. Kellogg made a false statement in the letter is practically undisputed, as is also the fact that it was communicated by Bolin to plaintiff, who rests his case upon it. If this was made with the intention that Bolin should use it to induce persons to take stock, and he did so use it in his transaction with plaintiff, thereby deceiving him, to his injury, the plaintiff made out his case, and the court did not err in refusing to direct a verdict, unless the next assignment of error should be sustained.

2. **Letter of September 27th.** It is contended that this letter was not admissible:

(*a*) Because plaintiff did not read or hear it read.
(*b*) Because Bolin was not authorized to communicate a sentence of the letter, only.
(*c*) Because plaintiff should not have relied on an isolated sentence, when the contents of the letter showed that it was written for another purpose.

(*a*) We are of the opinion that the statute (3 Comp. Laws, § 9518):

"No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, credit, ability,

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trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized"—does not preclude plaintiff's claim.

The jury found that this letter was written by defendant, with the intent that its contents should be used to induce the purchase of stock, and that the sentence in question was false. Furthermore, the purchase of stock was essential to the interest of the defendant, who was to acquire a $15,000 or $20,000 interest in a $100,000 company, if the stock could be sold. Not only is the case of *Getchell* v. *Dusenbury*, 145 Mich. 197 (108 N. W. 723), consistent with this view, but the cases there cited are in harmony with it. See *Bush* v. *Sprague*, 51 Mich. 41 (16 N. W. 222); *Hess* v. *Culver*, 77 Mich. 602 (43 N. W. 994, 6 L. R. A. 498, 18 Am. St. Rep. 421); *Hubbard* v. *Long*, 105 Mich. 442, 449 (63 N. W. 644). See, also, the later case of *Massey* v. *Luce*, 158 Mich. 128 (122 N. W. 514), which seems *apropos* to this question.

(*b*) Defendant's claim that Bolin was not authorized to communicate a portion of the letter is without merit. They were engaged in an enterprise in which the defendant made a statement to be used by Bolin. It was not necessary to use the other statements, contained in the letter, and if defendant's intent was fraudulent, as the jury found, it is enough if Bolin communicated the falsehood, whether he believed it or not.

(*c*) The plaintiff was justified in relying on this statement, as it was all he desired to know. Moreover, there is nothing in the letter tending to contradict or qualify it. It is apparently defendant's notion that, inasmuch as a perusal of the letter might have indicated that it was written for another purpose than to be used to influence him, he could not have been justified in relying upon it. That is the best kind of a letter for such use, as Bolin and defendant seem to have understood, when they agreed that defendant should "write a business letter, and give in

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that letter the earnings, so that he (Bolin) could show the people what they were buying, what business they were going into." Defendant's liability does not necessarily depend upon the good or bad faith of Bolin, who may have been a willing party to the fraud if no more.

3. **Letter of October 1st.** We agree with the learned circuit judge that a repetition in substance of the representation in the letter of September 27th tended to refute the claim that such representation was an inadvertence or mistake.

4. **Testimony of Bolin.** 5. **Testimony of Steele et al.** Bolin was allowed to testify to the amount of money secured by him from other purchasers of stock by the use of the representation in the letter of September 27th, and several such persons were allowed to testify that they made such purchases relying on said representations. While this may have tended to indicate a fraudulent intent on the part of Bolin, it was only upon the theory that there was complicity between him and defendant in the fraudulent act that it was admissible against defendant. We cannot say that such was not plaintiff's theory, although Bolin was not made a party defendant. In our judgment there was enough evidence to go to the jury upon such a theory had he been a party, and we think that the cause should not be reversed on this point. The testimony was comparatively unimportant, and if inadmissible it could not well have harmed defendant.

6. **Bolin's Testimony as to the Value of the Stock.** We are of the opinion that Bolin was competent to give testimony of the value of the stock. It was given with knowledge of all that had transpired up to the time the testimony was given, and he appears to have been as well qualified as any one.

7. **Plaintiff's Last Purchase.** The last hundred shares that plaintiff purchased were shares which one Saunders promised to take but did not. We think that the evidence fairly showed it to be a purchase of treasury stock, and,

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if the jury thought so, it was proper to include it in their verdict.

8. **Conversation with Defendant.** We think this testimony competent. It tended to show a sense of obligation consistent with plaintiff's claim, though it was not necessarily so.

9. **Refusal to Admit Certain Reports of Business.** These were offered by defendant to show Bolin's information regarding the business, contrary to his testimony. The secretary who made them was not sworn, and they were hearsay.

10. **Corn Flake Business.** The tenth point arose upon the refusal of the court to permit Kellogg to testify regarding the form in which he furnished information concerning the business of the Corn Flake Company. We think it was immaterial.

11. **Report of Manager.** Defendant claimed that Exhibit N was a report of the manager of the business, of date of December 18, 1906, and that Bolin was present and heard it read.

12. **Letter from Kellogg to Bolin, April 23, 1906.** We are of the opinion that no possible harm resulted to defendant from the exclusion of these documents.

13. **Refusal to Direct Verdict.** 14. **Motion for New Trial.** There is no occasion to discuss these points, further than to say that no error appears.

The judgment is affirmed.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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HAYES *v.* WABASH RAILROAD CO.

1. APPEAL AND ERROR — SAVING QUESTIONS FOR REVIEW — VARIANCE.

   The point that a variance appears, between proofs and declaration, cannot be raised on error, without presenting it to the court below.

2. CARRIERS — PRINCIPAL AND AGENT — AUTHORITY OF TICKET AGENT.

   Ticket or shipping agents of common carriers have authority to make all usual and ordinary contracts of carriage and shipment, and the public may assume that they are authorized to make such ordinary and usual contracts as they attempt to execute.

3. SAME — TRANSPORTATION — CONTRACTS — TICKET AGENTS.

   A city passenger and ticket agent is authorized to contract to carry several persons promptly from his station to another city and to guarantee them to connect with the train of another company at an intermediate station.

4. SAME — PAROL EVIDENCE — TICKET.

   The contract of carriage may be shown by parol, and is not limited to the terms of the ticket.

5. DAMAGES — CARRIER — SPECIAL CLAIMS.

   The expense of hiring a special train may be recovered of a carrier for failure to make a promised connection, where the ticket agent was informed in advance of the necessity and purpose of arriving on time.

6. EVIDENCE — TIME-TABLE.

   Since the passenger made his arrangements with the ticket agent who had apparent authority to make arrangements, evidence was inadmissible that defendant's public schedule stated that the time of arrival and departure of trains, or connections with other roads, were not guaranteed.

Error to Wayne; Mandell, J. Submitted June 17, 1910. (Docket No. 80.) Decided November 11, 1910.

Assumpsit by Edward Hayes against the Wabash Railroad Company for breach of a contract of carriage. A

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judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Hunt & Altland, for appellant.

J. Lawrence Hibbard (*Stevenson, Carpenter & Butzel*, of counsel), for appellee.

MCALVAY, J. Upon writ of error this case is brought to this court for review by defendant, asking that a judgment recovered against it be reversed, for reasons hereafter stated. The suit was brought by plaintiff to recover certain damages claimed to have been sustained by him on account of the failure of defendant to perform a certain special contract of carriage, made and entered into between plaintiff and the agent of defendant company in Detroit having entire charge of its ticket office in the city, being styled the "city passenger and ticket agent," and who has been so employed for many years. Plaintiff having urgent business before one of the departments at Washington, D. C., requiring his presence with his attorneys on July 20, 1904, at 10 o'clock a. m., and desiring to use the least time possible in making the trip, claims that he stated the circumstances to this passenger and ticket agent of defendant at Detroit, several days prior to that date, desiring to know if the defendant company, whose train left later than a Michigan Central train, would, without fail, furnish transportation and carry the party from Detroit to arrive at Washington before the required time; that if this could not be done he would take the Michigan Central; that both parties understood that the making of the connection at Buffalo was essential to make the trip within the time specified; that the agent promised to convey and transport plaintiff and his party from Detroit to Washington in time for the hearing and guaranteed and agreed to make the connection at Buffalo with the Pennsylvania Railroad Company without fail; that, relying upon this agreement, plaintiff afterwards on July 18, 1904, purchased five tickets and berths for himself

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and party at the office of defendant company in Detroit from such agent for transportation to Washington, D. C., and proceeded upon the journey; that at Buffalo the train missed connections, and plaintiff, in order to arrive at his destination on time, chartered a special train at Buffalo at an expense of $140, and succeeded in catching the train for Washington at Olean; that on that train he was required to pay a further sum of $4 for berth accommodations. For the recovery of these sums this suit was instituted. Upon the trial there was a dispute as to whether the claimed special contract was in fact made. This question was submitted to the jury and determined in favor of the plaintiff. A motion to direct a verdict for defendant was denied. The jury found a verdict for the amount claimed by plaintiff. Defendant made a motion for a judgment in its favor *non obstante veredicto*, which was denied, and a judgment was duly entered for plaintiff. The errors assigned relate to the denial of these motions, refusals to charge, portions of the charge as given, and the acceptance and rejection of evidence. Of these many errors assigned, it will be necessary to discuss but a few.

Defendant claims in its brief that there is a fatal variance between the declaration and the proofs of the plaintiff. We do not find that such a claim was made in the court below. It is well settled that this question cannot for the first time in a case be raised in this court.

The question as to whether the special contract of carriage was made by defendant's agent, as claimed by plaintiff, has been settled by the jury and will be accepted by this court as an established fact.

The question of importance in the case relates to the authority of the agent to make this contract. It is vigorously denied on the part of defendant that this agent had authority to make the contract claimed by plaintiff, and insisted that no testimony was introduced by him showing such authority; that the evidence on the part of defendant upon the question was positive and undisputed.

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It is established by the authorities that the ticket or shipping agents of common carriers have authority to make all usual and ordinary contracts of carriage and shipment, and that the public has a right to assume that they are authorized to do whatever they attempt to do. *Rudell* v. *Transit Co.*, 117 Mich. 568 (76 N. W. 380, 44 L. R. A. 415), and cases cited. From that case we quote:

"Only when contracts are of an unusual and extraordinary character is the shipper put to inquiry as to the agent's authority. Hutchinson on Carriers, § 267; 5 Am. & Eng. Enc. Law (2d Ed.), p. 351. A guaranty to a theatrical troupe that it would arrive at a given time is held valid. *Foster* v. *Railway Co.*, 56 Fed. 434. One writer says:

" 'As common carriers especially at the present day transact the greater part, if not all, of their business with the public through agents and servants, it is plain that the public have a right to assume that they are authorized to do whatever they attempt to do.' Lawson, Contracts of Carriers, § 229.

"The rule does not include contracts so unusual and extraordinary that they cannot reasonably be included within the general authority. * * * Many cases like the present and that of the theatrical troupe are constantly arising, where delivery at a certain time is essential. When the shipper and the carrier agree through its agent upon a date of delivery at destination which gives the usual time to make the trip, such contract cannot be held unusual or extraordinary and is within the general authority of the agent, * * * and when the contract is a reasonable one it must be upheld, in the absence of notice of lack of authority."

The facts in the case of *Foster* v. *Railway Co.*, cited *supra*, were as nearly identical as possible with the case at bar. The contract made with the agent of the carrier was the same as that made in this case. That court said:

"The transportation was not, and was not to be, any different from what any party might have had upon the same train. The substance of the guaranty was that such connection should be made at Crawfordsville as would take the troupe through in time. This was nothing undue, but was what was due, and if it was not undue it was not unreasonable."

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The contract in the case was to carry plaintiff and his party promptly from Detroit to Washington upon the regular train, to arrive there at the time required, guaranteeing the connection at Buffalo. The agent of defendant company who made this agreement was its passenger and ticket agent. We are unable to distinguish this case from *Rudell* v. *Transit Co.*, *supra*. The court was not in error in holding and instructing the jury upon this proposition that, if they found that the contract as claimed by plaintiff was made, he had a right to rely upon it in this case.

Argument is made that the contract between these parties is determined by the ticket issued at the time, claimed to have been a reduced rate ticket, under which plaintiff cannot recover. The record does not warrant the claim that this was a reduced rate ticket. This passenger and ticket agent testified that it was the regular rate to Washington given at the time by all the railroads. The authorities already cited hold that the contract of carriage may be shown by parol, and plaintiff's proofs tended to show that it was made several days before the tickets were purchased. This is also held in *Erie R. Co.* v. *Winter's Adm'r*, 143 U. S. 60 (12 Sup. Ct. 356).

It is contended that the damages recovered are special, and could not have been within the contemplation of the parties at the time of making the contract. It appears from the record that defendant's agent was fully and repeatedly informed of the exigency that plaintiff and his attorneys must be in attendance before one of the departments at Washington on July 20th, in the forenoon, on a matter of importance, and the agent so testifies. It is true the department and the case were not mentioned. The notice, however, was sufficiently explicit for the purposes of this case. The entire claim is for money spent by plaintiff to accomplish exactly what defendant failed to do, and the particular risk was expressly assumed by defendant as the verdict indicates.

Defendant discusses but two other assignments of error.

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The court refused to admit in evidence defendant's time-table for the purpose of showing that it contained a paragraph stating the time of arrival and departure of its trains was not guaranteed and the company did not hold itself responsible for failure to make connections, to show the limited liability of the company, and as bearing upon the credibility of the agent. The plaintiff went to the proper place for his information, and made his contract with the agent who assumed the authority to make it. He had a right to rely upon the representations of the agent and the contract entered into, and was under no obligation to consult time-tables or public schedules. *Van Camp* v. *Railroad Co.*, 137 Mich. 471 (100 N. W. 771). For these reasons it was properly excluded and as bearing upon the agent's credibility was not admissible.

The other error relates to the claimed inconsistencies contained in plaintiff's testimony, and the charge of the court as to what the contract was which was relied upon by plaintiff. The testimony of plaintiff taken together does not present to us the difficulty complained of. In fact, it appears to us both consistent and clear in stating the terms of this agreement. The contract relied upon was to transport plaintiff and his party to Washington by a certain time, by way of Buffalo, and guaranteeing to get them to Buffalo in time for the connection for Washington. It is obvious that the connection at Buffalo was a necessity in order to fulfill the contract, and it was the failure to make this connection in which defendant defaulted. Defendant does not appear to grasp the fact that both propositions were necessarily included in the contract which the jury found was entered into between the parties. The portions of the charge of the court complained of are consistent with this understanding.

We find no error in this case.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

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PEOPLE *v.* CURRY.

1. CRIMINAL LAW — CONSTITUTION — TRIAL BY JURY — DIRECTING VERDICT.

   In a prosecution for a violation of the local-option act, it is an invasion of respondent's constitutional right to a trial by jury for the court to instruct the jury that it is their duty to render a verdict of guilty, and, without permitting them to retire or deliberate, direct the clerk to take the verdict. *People* v. *Doyle*, 160 Mich. 423 (125 N. W. 858.)

2. INTOXICATING LIQUORS — LOCAL-OPTION ACT — FURNISHING LIQUORS.

   Quære: Does it constitute an unlawful furnishing of liquor, under the local-option law, for several persons in a county where the law is in force to contribute to a fund for the purchase of beer from a county where it may be sold, and to help themselves from the quantity purchased and held in common?

Exceptions before sentence from Ionia; Davis, J. Submitted June 24, 1910. (Docket No. 141.) Decided November 11, 1910.

John Curry was convicted of violating the local-option law. Reversed.

John Nichol, for appellant.

Dwight C. Sheldon, Prosecuting Attorney, and *John E. Bird*, Attorney General, for the people.

BLAIR, J. A number of young men of Ionia county, where the local-option law was in force, arranged to obtain a quantity of lager beer from Grand Rapids, where such law was not in force. The arrangement was, according to the undisputed testimony, that each of the parties thereto, including respondent, was to contribute $1 to a fund which was to be used by respondent in purchasing beer, cigars, and sandwiches and paying respondent's expenses. The refreshments, when secured, were to be delivered to

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the contributors at the fair grounds in the city of Ionia. In accordance with the arrangement, respondent went to Grand Rapids and purchased a half barrel and a case of beer, which was consigned and shipped to him by express, received by him, and by him caused to be transported to the grand stand at the fair grounds, where any of the contributors to the fund helped himself to as much as he chose and as often as he chose, without reference to the proportion that he had paid for. The record is silent as to whether respondent paid the dollar which he was to pay or whether he drank any of the beer, although he remained at the fair grounds until the next morning and shipped the empty half barrel and bottles to Grand Rapids. The circuit judge directed a verdict of guilty, and from such verdict respondent appeals, on the ground that the court should have directed a verdict of not guilty.

Respondent's counsel takes the position that, since the purchase of the beer was made in a county where such purchase was lawful, and the evidence shows, as he alleges, that the respondent merely acted as the agent of the others in the shipment and delivery of the beer, he was guilty of no offense and was entitled to an instructed verdict. There would be force in this contention if the evidence disclosed that respondent had no interest in the beer and merely purchased with the money furnished to him by individuals and delivered to each of such individuals the amount of beer paid for and belonging to him. *People* v. *Converse*, 157 Mich. 30 (121 N. W. 475). Such was not this transaction. The witness Miller testified:

"Curry was to go down and get the beer.

"*Q.* What was he to get out of it?

"*A.* He wasn't to get nothing out of it. He was to get his expenses. He was to contribute the same as the rest of us, $1. I think we got a rebate for it, 10 cents, something like that. Somebody gave it to me the next day at Lynes'. I am not sure, I got 10 or 15 cents. He figured out the expense of the hack and everything and gave us the rebate. I don't know what the beer cost, nor what

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the hack hire was, and I never asked Curry his expenses. * * *

"*Q.* As I understand it, you boys were to put up $1 apiece and somebody was to go down to Grand Rapids and get some beer?

"*A.* Yes, sir. It was agreed that whoever went should be paid his expenses. At the time we put up the dollar apiece I didn't expect to get any money back. It was to pay for the picnic and the expenses of the parties who purchased the beer and sandwiches and cigars. That was what the dollar apiece was contributed for. The money was placed in the hands of either Bowersox or Curry. Each man helped himself to the beer he wanted. I don't know whether any beer was left in the keg or whether there wasn't. Each man had what he wanted. I considered it my own beer I was drinking. I didn't purchase any beer from John Curry, nor did he give me any, or furnish me any except as he ordered it from Grand Rapids.

"*Q.* By *Mr. Sheldon:* No attempt whatever at any equitable distribution of this beer, was there?

"*A.* No, sir."

It is clear, therefore, that, under the agreement, respondent had the same interest in the beer, sandwiches, and cigars that the others had, and the testimony of all of the participants demonstrates that it was not the intention that the beer should be proportionately divided between them, but should be drunk indiscriminately by all, in accordance with their respective thirsts and holding capacity. It is clear that if each of the parties had received individually a certain number of quarts or bottles of beer as his own property, and each had poured such beer into a receptacle to be drunk in common, he would have been guilty of furnishing such beer to the others, in violation of the local-option act. *People* v. *Myers*, 161 Mich. 40 (125 N. W. 701).

It seems equally clear to us that where, as in this case, the beer is undivided and drunk in common, each person is furnishing a portion of the beer paid for by him to others, and that each of the parties to the agreement engaged in drinking the beer in question was guilty of a vio-

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lation of the local-option law. We are also of the opinion that, whether respondent had any pecuniary interest in the beer or not, or whether he drank any of it, he would be equally guilty with the others, if he procured the beer for them to be used as it actually was used.

We feel obliged to reverse this case, however, for the reason that in directing the verdict the court invaded the constitutional rights of respondent. In his instructions to the jury the court said, among other things:

"*The Court:* I think the way the case stands, gentlemen, it is one for the court to dispose of. I would much rather submit the matter to the jury if based upon any facts that might warrant the court in submitting it. * * * In the judgment of this court the title and control of that property was in Mr. Curry, and by permitting others to take from what was then, in part at least, his individual property, it has been a violation of the law, and it would be your duty to return a verdict of guilty on all three counts. Take the verdict, Mr. Clerk. (Verdict received.)

"*The Court:* I think, in view of what our court have held in this class of cases, there will be an order entered giving you until the first day of next term of this court to have this matter passed upon by the Supreme Court; in the meantime, the respondent will remain upon the same recognizance for his appearance here until the first day of the next term of this court."

These instructions really made the verdict that of the court, and not of the jury, and compel a reversal of the conviction. *People* v. *Doyle*, 160 Mich. 423 (125 N. W. 358). In view of the important nature of the constitutional right invaded, we have felt it to be our duty to consider the point, although it is not raised by respondent.

The conviction is reversed, and a new trial ordered.

MCALVAY, J., concurred with BLAIR, J.

STONE, J. I concur in the result because of the directed verdict.

OSTRANDER, J., concurred with STONE, J.

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HOOKER, J. I concur in the conclusion reached by Mr. Justice BLAIR upon the ground that, in directing the clerk to enter a verdict without giving the jury an opportunity to retire, the learned circuit judge gave the jury no opportunity to consider the case and disobey the instruction. The case of *People* v. *Collison*, 85 Mich. 105 (48 N. W. 292), is a case directly in point, and established the rule in this State that, in a case of misdemeanor, a party has a right to expect, if not to ask, a jury to disobey the instructions of the court to find a verdict of guilty, and that the trial court must give the jury the opportunity of doing so, though we have held that a defendant was not entitled to an instruction that they might disobey the instruction of the court to find a verdict of guilty, in the case of a misdemeanor. See *People* v. *Gardner*, 143 Mich. 116, 117 (106 N. W. 541). The *Collison Case* has been followed since. See *People* v. *North*, 153 Mich. 616 (117 N. W. 63).

I am not convinced that, where several persons send one of their number to purchase beer at a city where the purchase is lawful, and it is received by them via an express company, the one who purchased becomes liable for furnishing to one of their number, who drinks more than his proportionate share, as measured by the cost of the beer and their several contributions to the fund expended for the beer; nor am I sure that the evidence warrants the conclusion that one or more did so. The beer being owned in common, each had a right to help himself to his share, and another would not be liable as a furnisher of beer merely because one took more than he paid for. Apparently, my Brother BLAIR'S opinion rests upon the expectation of the parties that this beer, paid for and owned jointly, would or might not be accurately divided—a proposition that I doubt. On the other hand, I am not sure that I would withhold my assent to the doctrine that one who causes beer to be shipped to himself, or himself and others, with the understanding with his fellows that it is to be divided in proportion to their respective contri-

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butions or to be used in common, might be guilty of unlawfully furnishing beer, if the beer was so delivered and shared by himself and others. I am unable to distinguish such a case from *People* v. *Lapham* 162 Mich. 394 (127 N. W. 366). Such would seem to be a clear case of furnishing, wherever he might get the beer.

I think, also, that such act is not within the decision in the case of *People* v. *Converse*, 157 Mich. 30 (121 N. W. 475). That case holds that the shipment by express from a county in which the selling of beer is lawful, to a purchaser residing in a county where it is prohibited, and the delivery there by the agent of the express company in the due course of business, does not make such express agent the keeper of a place where liquor is given away and furnished, or of unlawfully furnishing the same, which were the charges upon which the defendant was tried. It does not hold that a private citizen living in a "wet" county, may by agreement go and procure liquor, in his own county, or anywhere else, and bring it or have it brought into the "dry" county, and deliver or cause it to be delivered therein to another and not be guilty of "furnishing" within the local-option act. The *Converse Case* protects the agent of the express company, but it in no way sustains the claim that a party procuring and delivering liquor personally or in any other way within the dry county may escape the law against furnishing because he does it at the request of or under employment by the person for whom it is procured, and therefore was an agent. An agent may violate the law against furnishing as well as another, in my judgment. The acts done in the "dry" county constitute the breach of the law. The case holds that the law, being penal, cannot be extended to the act of the express company and its agent in the course of business. This follows the rule requiring strict construction of penal statutes.

The conviction should be set aside, and a new trial ordered.

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PEOPLE *v.* KEMPPAINEN.

1. ABATEMENT AND REVIVAL — CRIMINAL LAW — BASTARDY PROCEEDINGS.

   Neither under the common law nor by the provisions of chapter 153, 2 Comp. Laws, does a proceeding for the maintenance of an illegitimate child survive after the death of the respondent.

2. SAME—DEATH.

   At common law the cause of action survived if the injury done affected property rights; if the wrong affected the person alone the action abated.

Certiorari to Houghton; Streeter, J. Submitted June 27, 1910. (Docket No. 147.) Decided November 11, 1910.

Bastardy proceedings against Peter Kemppainen. A judgment for plaintiff is reviewed by defendant on writ of certiorari. Judgment and proceedings abated.

John Kiiskila and *P. H. O'Brien*, for appellant.

William J. MacDonald, Prosecuting Attorney, for the people.

MCALVAY, J. Defendant was adjudged to be the father of an illegitimate child, before the circuit court for the county of Houghton, and to stand charged with its maintenance until it arrived at the age of 14 years. The order and judgment provided for the payment of money, the furnishing of a bond, and other details usual in such cases, and, in default of compliance therewith, he to be committed to jail until such bond was given. A motion for a new trial was denied, and the case was removed by defendant to this court for review upon writ of certiorari. Sixty days after the return to the writ was made to this

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court there was filed a notice to the prosecuting attorney of the suggestion of the death of the defendant upon the record of the court in this cause, which notice further states:

"And it is hereby ordered that Andrew Bram be and is hereby substituted as defendant in said cause, instead of Peter Kemppainen, deceased."

The intention, without doubt, was to suggest of record the death of defendant, with permission to Bram to defend as his legal representative, and it will be so treated by this court.

The question of the effect of the defendant's death upon this action is not discussed in the briefs. To a suggestion to the attorney general that a brief upon the question would be received, a reply has been returned that he had no desire to be heard. The question presented is whether the right of action under chapter 153, 2 Comp. Laws, survived. In the investigation of the authorities in the United States, we find two cases where practically the exact question was involved under proceedings provided by statutes similar to chapter 153, 2 Comp. Laws; both holding that bastardy proceedings abate upon the death of the defendant. *McKenzie* v. *Lombard*, 85 Me. 224 (27 Atl. 110); *Clements* v. *Durham's Adm'rs*, 52 N. C. 100. In the Maine case, the death occurred during the pendency of the proceedings, but before trial. That court said:

"No judgment is sought for or is obtainable against property. The process, though held to be a civil proceeding, is criminal in form, and is an extraordinary means to compel a father to assist in the support of his illegitimate child, or suffer imprisonment as a penalty for his neglect to do so. There is no fitness in the proceeding that would adapt itself to the principle of survivorship. If the pending action survives, then the cause of action would survive as well, and the process could be originally instituted against the administrator of the deceased. * * * The incongruities that would beset such a proceeding are obvious enough. It would be a strange sight to see an administrator arrested, required to give a bond, be put on

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trial, and perhaps imprisoned for an act of bastardy committed by the party officially represented by him."

The reasoning of the North Carolina case is along the same lines. In that case the proceedings were instituted against the representatives of the deceased putative father, being in fact the suppositious case used by the court in *McKenzie* v. *Lombard*, above quoted, but a better illustration, as there were two representatives, who were proceeded against.

Such a right of action would not survive at the common law.

"The true test was whether the injury on which the cause of action was based affected property rights, or affected the person alone. In the former case the cause of action survived, while in the latter it abated." 21 Enc. Pl. & Prac. p. 313, and cases there cited.

There is no statute in Michigan which provides for such survival. In our investigation, we have found in one State (Indiana) by statute such right of action survives, "with like effect as if such father were living, except that no arrest of such personal representative shall take place, or bond be required." See *State* v. *Williams*, 8 Ind. 191. In the absence of a statute, we find no authority holding that the right of action in this case would survive. Upon the death of defendant it abated, and these proceedings, and the order and judgment brought here for review by reason thereof, became of no force and effect.

A judgment will be entered accordingly.

OSTRANDER, MOORE, BROOKE, and BLAIR, JJ., concurred.

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WIPFLER v. WARREN.

1. ATTORNEY AND CLIENT—LIEN—JUDGMENT.
   The law creates the lien of a solicitor upon the judgment or fund resulting from his services.

2. SAME—REDUCING CLAIM TO JUDGMENT—TERMINATION OF LIEN.
   An attorney's lien is lost by reducing his demand to judgment.

3. SAME—SUBSTITUTION.
   A solicitor may not complain of a substitution of solicitors if the order of substitution preserves his lien.

4. SAME—DETERMINATION OF LIEN—EQUITY JURISDICTION.
   A court of chancery, after rendering a decree for defendants in a stockholder's suit, and ordering the receiver, who was appointed pending a determination of the facts, to account for funds in his hands, may protect the lien of defendants' solicitor on said fund in the receiver's hands, and on motion of defendants to substitute solicitors, tendering an issue as to the amount due their solicitor, the court has power to determine the amount.

5. EQUITY—COURTS—JURISDICTION — TRANSITORY ACTIONS — SITUS OF PROPERTY.
   Complainant filed a bill for an accounting and other relief in the county of her residence, representing that in a suit by her husband to establish his interest in a corporation, a decree had been entered for the defendants; that the complainant who was the receiver in the cause, although ordered to account for property in his hands had failed to do so; that the defendants had, on motion, substituted a solicitor for their original counsel, whose lien the order of the court, made on such motion, preserved; that an issue of fact framed by said court in chancery as to the amount due defendants' solicitor was joined and determined by order of the court; that the complainant later executed a mortgage upon property in the county of Wayne to pay an alleged claim against the defendant corporation of her husband, one of the defendants who had assigned the claim to a third party, also a defendant in the suit. The bill prayed that the respective rights of the parties be determined, the order determining the amount of the solicitor's lien vacated, and the real estate mortgage be canceled. *Held* on pleas to the jurisdiction, that the

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Jackson circuit court has no jurisdiction over the cancellation or foreclosure of a mortgage upon real estate situated in Wayne county, and complete relief could not therefore be rendered upon the claims of the defendants based on the instrument.

Appeal from Jackson; Parkinson, J. Submitted June 21, 1910. (Docket No. 17.) Decided November 11, 1910.

Bill by Lucy Wipfler against Fred H. Warren, Charles R. Robertson, Ross A. Rastall, Detroit Pattern Works, Charles E. Wipfler and J. Louis Horn to obtain an accounting, a determination of the several claims of defendants, for a receiver and the dissolution of defendant corporation. From a decree for defendants, complainant appeals. Affirmed.

Grove H. Wolcott, for complainant.

Charles R. Robertson (*Choate, Webster, Robertson & Lehmann*, of counsel), for defendants.

Pending the suit of Charles Wipfler, complainant, v. Detroit Pattern Works, Lucy Wipfler, Charles E. Wipfler, and Louis Horn, defendants, to establish the rights of complainant in defendant corporation, the circuit court for the county of Wayne, in chancery, had, through its receiver, sequestered the property, or some of the property, of said corporation. After a decree had been entered in this court (140 Mich. 677 [104 N. W. 545, 112 Am. St. Rep. 430]), such proceedings were had in the court below that Charles Wipfler, who had been appointed receiver and who had filed a bond as receiver, was, on or about April 10, 1906, directed to pay the sum of $3,762.78, found to be in his hands as such receiver, to the Detroit Pattern Works. This order and decree of the said court neither he nor his surety, it appears, has ever performed. On or about January 7, 1907, a motion was entered in said cause in the said circuit court by defendants, or some of them, for an order substituting William C. Gottman

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as solicitor for defendants in the place of Fred H. Warren, who had been their solicitor. This motion came on to be heard in said court, and at said hearing it was represented to the court by affidavits and by oral testimony on the part of the defendants that said Warren had agreed to do all the legal work in connection with said litigation to its final determination for $500, and to pay all the costs, "such as briefs, records, etc.;" that said Warren had been paid $550, and refused to consent to the substitution of solicitors until he had been paid a further sum. On the part of said Warren, it was denied that he agreed to perform the said legal services for the sum of $500 or any other specified sum, or ever agreed to pay out of said sum the costs for records, briefs, etc., or any other costs. The services which had been rendered and their value, and whether or not any such agreement was made, and the amounts of money which had been paid to the said Warren, were submitted to the court, and the court on January 7th made and entered a decree to the effect that said Warren made no such contract as was alleged; that the suit had passed to a final decree, and all that remained to be done was to collect the money from the receiver; that the reasonable value of the services rendered by such receiver was $1,500; that his disbursements were $167.43; that he had received certain sums from the defendants and collected certain other sums which he had legally and properly applied toward the payment of disbursements and fees; that there was due to him the sum of $651, for which sum he was entitled to a first lien upon the decree in said cause and the moneys payable under said decree. The receiver and his surety were ordered to pay this amount to Warren forthwith. A claim of appeal from said decree was made and filed. Various periods of extension were granted by said court of the time to settle a case on appeal. The appeal was never perfected, and the decree of January 7, 1907, aforesaid, became absolute on or about August 8, 1907. It further appears that Charles Wipfler, complainant in the

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action referred to, claimed that the defendants in said action were indebted to him for services, which claim, or a part of it, was assigned to one Charles R. Robertson of the city of Detroit, who thereby began a suit in assumpsit in the Wayne circuit court to recover the same against the Detroit Pattern Works, Charles E Wipfler, and Lucy Wipfler, and at the same time garnished the surety of the receiver. Lucy Wipfler appeared in said cause, but later, by an arrangement and agreement, made in writing October 29, 1908, Lucy Wipfler agreed that, if she or the Detroit Pattern Works should obtain a judgment against the receiver and his surety, she would pay the sum of $1,500 out of the money so recovered to a trustee named in said agreement to settle the said demand, and she made a mortgage upon certain real estate situated in the county of Wayne to secure payment of $1,000 of the said $1,500 to the said trustee. Later a mortgage upon another description of property was substituted for the mortgage first given. This arrangement was in settlement of the demand so asserted by said Robertson in said suit, and the suit was discontinued.

The matters referred to being in the condition stated, Lucy Wipfler removed from Wayne county to Jackson county, Mich., and in the latter county, on September 21, 1909, she filed her bill of complaint and made the Detroit Pattern Works, Charles E. Wipfler, J. Louis Horn, William C. Gottman, Fred H. Warren, Charles R. Robertson, Ross A. Rastall, parties defendant, asking that they answer the bill; that an accounting might be had to determine the rights of herself, the said Charles E. Wipfler, and J. Louis Horn to the property and effects of the Detroit Pattern Works; that the claims and demands and asserted liens on Warren, Gottman, Robertson, Rastall, trustee in the mortgage, and Charles Wipfler upon said assets be considered, and, if found to be invalid, so declared, and, if valid, that decrees determining their nature, validity and extent be entered; that a receiver be appointed to discover and collect the property and effects of

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the Detroit Pattern Works (which are alleged to consist only of the money due from the receiver); that a decree be entered formally dissolving the corporation known as the Detroit Pattern Works, and distributing the assets to the persons entitled thereto. It is charged that the arrangement by which the demand asserted by Robertson was liquidated, and a part of it secured, was fraudulent. The facts here stated are not in dispute.

To this bill of complaint Fred H. Warren filed his plea to so much and such parts of the bill as asked any relief against or sought a recovery from him, setting up in the plea some of the facts to which reference has been made, including the decree of the circuit court for the county of Wayne, in chancery, establishing his demand and lien. The defendants Robertson and Rastall also filed a plea to the effect that the subject-matter, in so far as such defendants were interested, was not local, but that the bill as exhibited, in so far as they were interested in it, related to and affected lands and real estate in the county of Wayne. The defendant Robertson also filed an answer in support of his plea to the jurisdiction; the essential allegation of which, in so far as the point to be considered is concerned, is that the bill in effect was filed to set aside and cancel a real-estate mortgage on real estate in the county of Wayne, quieting the title thereto. Later the bill was dismissed as to the defendant William C. Gottman. It was taken as confessed by the Detroit Pattern Works, Charles E. Wipfler, J. Louis Horn, and Charles E. Wipfler, as president of the Detroit Pattern Works, for want of appearance. But upon the pleas of the said Warren and the said Robertson and Rastall, respectively, it was determined, and a decree to that effect was made and entered, that the court had no jurisdiction with respect to the right of the said Warren to a lien upon the decree rendered in the original cause. It was further ordered and adjudged that the court had no jurisdiction with respect to the said defendants Robertson and Rastall because the matters concerning said defendants were subject only to the juris-

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diction of the circuit court for the county of Wayne. The pleas therefore were allowed, and, as to those defendants, the bill dismissed with costs. From this decree, the complainant has appealed to this court.

As to the decree in favor of Fred H. Warren, it is contended that the decree of the circuit court for the county of Wayne, establishing the sum due to said Warren and declaring it to be a lien upon said original decree and the moneys due thereunder, was beyond the power of the court to make and enter; that the only issue which the said court had power to determine was whether Gottman should be substituted for Warren, or whether the said defendants were entitled to such substitution; and that the only order the judge should have made was that there should be substitution when the controversy as to Warren's fees was settled.

As to the defendants Robertson and Rastall, it is contended that no real estate or interest in lands is involved in the controversy; that one of the purposes of the suit is to determine the validity of the agreement made by complainant with respect to the lien of said defendants upon the original decree and the interest of the defendant Robertson in that decree, a proceeding which is transitory, and can be brought in the county of complainant's residence; that, if the agreement by which the mortgage was procured was fraudulent, the mortgage given as collateral security for the performance of it must of necessity fall with it, but that the nature of the bill must be determined from the relief asked, which is only that the claim of lien of said defendants upon the said original decree be adjudicated with reference to its validity or invalidity.

OSTRANDER, J. (*after stating the facts*). The law creates the lien of a solicitor upon the judgment or fund resulting from his services. As a general rule, if the demand is reduced to a judgment against the client, the lien is lost, and, as a general rule, a solicitor may not complain of a substitution of solicitors if the order of substi-

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tution preserves his lien. *Jones* v. *Muskegon Circuit Judge*, 95 Mich. 289 (54 N. W. 876). The original decree required the receiver to pay a fund, the amount of which was also established, to one of the clients of Mr. Warren. Complainant here claims to be owner of the fund. The decree determining the amount of the lien of Mr. Warren was, in effect, a modification of the original decree, was made in the same cause upon the determination of an issue of fact which was tendered by the clients of Mr. Warren, of whom the complainant here was one. It may be remarked that she proposes in her present suit to submit the identical issue to the circuit court in chancery for the county of Jackson. We have no doubt of the power of the court which made the original decree to so direct its receiver that the lien of the solicitor should not be impaired, and find no reason or authority for denying the power to determine upon the application of the fund owners the extent of the lien.

As to the contention respecting the plea of defendants Robertson and Rastall, it is apparent, other considerations aside, that the circuit court in chancery for Jackson county cannot render complete relief. It cannot entertain a cross-complaint to foreclose the mortgage nor enter a decree which shall operate as a strict foreclosure, nor compel a discharge of the mortgage. The bill of complaint is directed to securing a release of the mortgage upon land in Wayne county, a result which, whatever the decree of the court may be, must be finally brought about by a proceeding in the county in which the land is situated. This court is not called upon to determine, but it is proper to suggest, whether the Jackson county court ought to make any order, determination, or decree respecting the fund which is in the hands and under the control of the Wayne county court; whether the receiver and his surety can be discharged of responsibility under an existing decree by obeying, not the order of the court appointing the receiver, but the order of some other court. It is a plausible argument that only the rights of certain persons as between

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each other are involved. But to the extent that we are called upon to determine those issues, effective and complete determination involves disposition of a fund still in the hands of a receiver of a court other than the court asked to render the required decrees.

The decree is affirmed, with costs to appellees.

BIRD, C. J., and HOOKER, BLAIR, and STONE, JJ., concurred.

PEOPLE *v.* DUFFEK.

1. CRIMINAL LAW—TRIAL—VERDICT

   In a prosecution for assault with intent to kill and murder, a verdict signed and sealed by the jury before they separated, reading as follows: "Assault with intent to do great bodily harm, less than the crime of murder," was a sufficient statement of the conclusion.

2. SAME—CHANGING SEALED VERDICT.

   No substantial or prejudicial change was made by the jury's opening the sealed verdict, with the permission of the trial court, after reassembling, and prefixing the phrase, "We, the undersigned jurors, find the respondent, Andrew Duffek, guilty of."

3. SAME—TRIAL—JURY—SEPARATION.

   While 3 Comp. Laws, § 11960, requires jurors in a case involving a prosecution for murder to remain together from the time they are elected until they render their verdict, no rule or statute prohibits them from separating in other classes of criminal cases. See Act No. 4, Pub. Acts 1909, amending § 11960.

4. SAME—SEALED VERDICTS—SEPARATION OF JURY.

   Whether or not a jury has separated after signing and sealing but before returning their verdict in court, it is the right of any juror to refuse to assent publicly to the verdict which is announced.

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5. SAME—CONSTITUTIONAL LAW—SEALED VERDICT.

No constitutional right of the accused is infringed by the jury's being permitted to separate after agreeing upon, sealing, and delivering to the officer having them in charge, a verdict to which they afterwards assent publicly in court.

Exceptions before sentence from Grand Traverse; Mayne, J. Submitted June 27, 1910. (Docket No. 114.) Decided November 11, 1910.

Andrew Duffek was convicted of assault with intent to do great bodily harm, less than the crime of murder. Affirmed.

Parm C. Gilbert and *John W. Patchin*, for appellant.

Fred H. Pratt, Prosecuting Attorney, for the people.

The cause is here on exceptions before sentence. The material facts, briefly stated, are: Respondent was charged in the information with having made an assault with intent to kill and murder. The jury retired to consider of their verdict and were brought into court late in the evening and instructed that if they reached an agreement during the night they might write and sign the verdict, deliver it to the officer having them in charge, who should deliver it to the clerk of the court, and might then separate, appearing in court the following morning, at which time each must assent to the verdict, meantime keeping secret and refusing to talk about it. Respondent, who was at large upon bail, was present when this instruction was given, but his counsel were not present. The jury (each member thereof) signed and sealed a verdict in the following form:

"TRAVERSE CITY, MICH.,
"March 10, 1910, 3 a. m.

"Assault with intent to do great bodily harm less than the crime of murder."

Which was duly delivered to the officer in charge and by him to the clerk of the court, was not opened, nor

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were its form or contents made known to respondent or to the court until after the second verdict had been received and entered. At the opening of court 11 jurors appeared; one juror being ill. The jury again separated, being cautioned as they had been the previous evening. The morning of March 11th, at the opening of court, all the jurors being present, the foreman of the jury reported to the judge that he thought there was an error in the form of the verdict, and at his request it was returned to the jury unopened and unannounced, the jury retired and later returned into court with a sealed verdict, signed by each of them, containing the additional words,

"We, the undersigned jurors, find the respondent, Andrew Duffek, guilty of."

The clerk received the sealed verdict last returned from the foreman of the jury, called the names of the jurors, opened the verdict, and by direction of the court read it, polled the jury, and recorded the verdict. Motions to set aside the verdict and for a new trial and to discharge respondent were overruled.

OSTRANDER, J. (*after stating the facts*). The exceptions present the questions: (1) Whether, on the trial of one charged with having committed a felony, the jury may be permitted to separate after agreeing upon, signing, sealing, and delivering to the officer having them in charge, a verdict, and afterwards return into court and assent publicly to the result so agreed to; (2) whether, in such a case, the sealed verdict having been delivered to the clerk, it may be returned to the jury, upon the request of the foreman, by direction of the court, unopened and unannounced, for correction, and, having been corrected in form only, it may be received as the verdict of the jury.

There is a further contention stated in the brief, which is that the verdict first signed is not sufficient to support a judgment. The argument for appellant is confined largely to a statement of his contentions, and a single authority (*Farley* v. *People*, 138 Ill. 97 [27 N. E. 927]) is cited.

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In Illinois the subject is governed by statute which permits the taking of sealed verdicts in criminal cases if the respondent expressly consents to such a course. The questions have never before been presented in this court.

The second question, upon the facts stated, should be answered in the affirmative, provided the first question is also answered affirmatively. The writing first made and signed by the jury was a sufficient statement of the result arrived at and was the identical result stated in the verdict announced. In this jurisdiction verdicts, in criminal cases, are usually announced orally—are not first written—and in answer to the usual question propounded by the clerk of the court it is not uncommon for the foreman of the jury to state no more than that the verdict is "guilty," adding words necessary to indicate the offense or the degree or element thereof. Being reduced to the usual formula by the clerk, it is repeated by him back to the jury for reaffirmance. There can be no doubt that the two verdicts as written by the jury announce the same conclusion, and no doubt concerning the conclusion arrived at. I am satisfied, too, if the fact is found to be material, if the consent of respondent that a sealed verdict might be returned was essential, that such consent was not given, and that the cause stands precisely as it would if such consent had been refused.

The first question must be answered by reference to the Constitution, and beyond that to the incidents of trial by jury contemplated by the Constitution, to some statute, or to some rule of practice so reasonable and so long and uniformly followed that a failure to follow it may be said to invade a right of the accused. The provisions of 3 Comp. Laws, §§ 11960–11962, apply only to cases in which the accused is on trial for murder. Act No. 4, Pub. Acts 1909, purports to amend 3 Comp. Laws, § 11960. Whether the section as amended is within the title of the original act, we need not determine since we are of opinion that the provisions of said Act No. 4 are not controlling of the

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question here presented. The provisions of the Constitution which may be supposed to in any manner support the contention which is made are found in sections 27 and 28 of article 6.[1] The first of these provides that the right of trial by jury shall remain, and this provision, it has been held, secures to a respondent all of the essential incidents of trial by jury as it existed at the time of the adoption of the Constitution.

"The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood, under a particular name; and, by implication at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the legislature cannot take them away. The next section of the Constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the legislature cannot take away a single one of its substantial and beneficial incidents; * * * and even the accused cannot waive any one of the essentials." *Vide*, COOLEY, J., in *Swart* v. *Kimball*, 43 Mich. 443, 448 (5 N. W. 635, 637).

See, also, *Hill* v. *People*, 16 Mich. 351; *Underwood* v. *People*, 32 Mich. 1 (20 Am. Rep. 633); *People* v. *Marion*, 29 Mich. 31. It was said by Mr. Justice CHRISTIANCY, in *Hill* v. *People*, 16 Mich. 351, 357:

"The true theory, we think, is that the people, in their political or sovereign capacity, assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such; and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors, and other safeguards for his trial, in accordance with the Constitution, which secures his rights."

But what are the substantial and beneficial incidents thus guaranteed? The power of the legislature to change the qualifications of jurors and the manner of their selection is not doubted. *People* v. *Harding*, 53 Mich. 48

[1] Const. of 1850. See §§ 13, 19, Art. 2, Const. 1909.

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(18 N. W. 555, 51 Am. Rep. 95). It is error to refuse a demand of a respondent to poll the jury. *Stewart* v. *People*, 23 Mich. 63 (9 Am. Rep. 78). But very often the exercise of this right is not claimed. It will be difficult to state any general rule according to which the rights of an accused person, guaranteed by the Constitution, may be determined, especially where they are immediately grounded on some alleged failure of procedure. It is the purpose of the law, alike in civil and in criminal causes, to secure in the verdict of a jury a result unaffected by extrajudicial influences, one based upon the evidence given in court and the instructions of the court. In this the State is interested quite as much as is the individual suitor. Various precautions have at different times been taken to secure such a result in criminal causes which have not been deemed necessary in civil causes. Not all of them were for the peculiar benefit of the accused, but some of them rested and rest in considerations of public policy and the fair administration of the law. The consequences of verdicts in criminal causes are supposed to have a significance and effect both with respect to the public and the accused which does not exist when merely private adversary conditions are involved. This idea is reflected, to some extent, in distinctions made in procedure in trials of those accused of felony and those accused of misdemeanor only. It is reflected, also, in the statute which has been referred to, which relates only to trials of those accused of murder. In criminal causes, if treason or felony was charged, it was the early practice in England to refuse the jury permission to separate during the recesses of court and to keep them together in charge of an officer of the court. They were, virtually, prisoners. Necessity compelled relaxation of the rule, and after a time jurors were permitted to retire for rest and refreshment, but not to go to their homes or to mingle with the general public. See *Hardy's Case*, 24 Howell's State Tr. 414; *Rex* v. *Stone*, 6 Term Rep. 527; Thompson & Merriam on Juries, tit. 2, entitled "Of the

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Custody and Conduct of Trial Juries." Judges in the United States and in England have long since exercised the power of permitting jurors, in criminal causes, to separate and to go to their homes, from day to day, during the progress of the trial and before the cause was finally committed to the jury, and courts of error have held that, in the absence of some circumstance tending to prove improper conduct of jurors or improper influences affecting a verdict, the practice afforded no reason for disturbing a verdict. On the other hand, it has not been uncommon for trial courts, in view of known or suspected conditions, to require jurors to remain in the charge of an officer of court during the entire course of the trial. It is the common practice in this jurisdiction, in civil and in criminal causes, to keep jurors, after the charge of the court has been delivered, together until a verdict has been returned. Usually the court is in session when an agreement of the jury is reached, and in such cases not even convenience would be served by receiving a sealed verdict. Occasionally convenience, and something more, is sacrificed if a jury, after having reached a conclusion, is forced to remain in retirement until the opening of court.

In *Pierce* v. *Pierce*, 38 Mich. 412, it was said:

"There is no legal propriety in keeping a jury confined unreasonably after they have come to an agreement. * * * Any unusual and prolonged delay is not to be favored without giving an opportunity to find a sealed verdict."

In *Liverpool, etc., Ins. Co.* v. *Friedman*, 133 Fed. 713, 66 C. C. A. 543, a case in which the trial judge, after charging the jury, permitted them to go to their homes for Thanksgiving day and reassemble and find and return a verdict, it was held that common-law rules of practice controlled, and, whatever the practice was in Michigan (in which State the cause was tried), there was no legal objection to the course pursued, no improper conduct of any juror being shown or charged, and no claim made that any had been approached or influenced with

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respect to a verdict. It is not unreasonable to assume that the practice pursued in the case of *Stewart* v. *People*, *supra*, the respondent being also given the right to poll the jury, has been regarded by the profession as proper practice in criminal causes. It is a practice approved, by statute or otherwise, in a considerable number of the States. The bill of exceptions in that case discloses that respondent was charged with having committed a felony; that counsel for respondent, in the presence of respondent, consented that a sealed verdict might be returned; and that the jury separated after signing and sealing the verdict. It discloses that the reason for the ruling of the trial court was that, the jury having separated after signing and sealing the verdict which had been returned, the only inquiry open was whether the jurors had all joined in the written verdict before they separated, and "no question having been raised in respect to the jurors having all joined in the sealed verdict returned to the court, and such sealed verdict purporting to be signed by all the jurors," the right to poll the jury was denied. But if the practice there pursued, as corrected by this court, is proper practice—is not open to criticism by the accused person—it does not follow, of necessity, that other practice, namely, the return and acceptance of a sealed verdict without the consent of the accused, is not also proper practice. Arguments to support the assertion that the trial court may not, in the absence of a statute, in the exercise of sound discretion, direct the signing and sealing of a verdict in criminal causes, must rest, I think, upon one or both of two grounds. One is that jurors may be improperly influenced after they have separated and before they assent, in open court, to the verdict they have sealed; the other is that, if the sealed verdict is defective in substance, or is not assented to in open court by all of the jurors, the cause may not be recommitted to the jury and there must be a new trial.

Whether or not a jury has separated before returning a verdict in court, it is the right of any juror to refuse to as-

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sent publicly to the verdict which is announced. If a jury signs and seals a verdict and separates, and later the verdict is returned and read in court and assented to by the jury, and by each of them, if required to do so, it would seem that no presumptions should be indulged that after separation improper influences had affected the verdict. Indeed, in Massachusetts, in such a case, the oral verdict is the verdict of the jury, and the sealed verdict is regarded, principally, to ascertain whether it agrees with the verdict returned orally in court. An argument based upon the idea that improper influence *might* be exercised after separation of the jurors, for which reason they ought to be kept together until a verdict is rendered, would also support the proposition that in all criminal causes jurors should not separate after the case is opened to them until they have been finally discharged by the court; a practice which, out of caution, and because of peculiar conditions, is often pursued, but the failure to pursue it is not, of itself, in most jurisdictions, at least, held to be error. It is clear that the consent of the accused that one or other practice be followed will not estop him to question a verdict on the ground that it has been improperly procured.

The other ground, namely, the hazard attending the sealing of the verdict, better supports a reason for receiving one only by consent of the accused. There is most respectable judicial authority and good reason for saying that in a criminal case the functions of a jury have been discharged when they have concluded deliberations and have agreed to, signed, and sealed a verdict, and that after having separated they have no further duty to perform in the case except to deliver to the court and announce the sealed verdict to be the verdict of the jury. *Koch* v. *State*, 126 Wis. 470 (106 N. W. 531, 3 L. R. A. [N. S.] 1086); *Farley* v. *People*, 138 Ill. 97 (27 N. E. 927). This rule has been applied in cases where the sealed verdict which was returned required substantial correction and the question was whether the jury could be permitted to again retire for the purpose of amending the

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verdict otherwise than in mere form. See, also, *Hechter* v. *State*, 94 Md. 429 (50 Atl. 1041, 56 L. R. A. 457), and *Williams* v. *People*, 44 Ill. 478; and, as apparently announcing a different rule, see *Pehlman* v. *State*, 115 Ind. 131 (17 N. E. 270), and *Jackson* v. *State*, 45 Ga. 198. In all of these cases the sealed verdict was rendered by consent of the accused. In this view of the functions of a jury, which I think is the proper view, the dissent of one juror from the sealed verdict, as well as the sealing of a verdict defective in substance, would alike result in a mistrial. This result, at least in most cases, would not occur if the jury rendered the verdict orally, through their foreman, before separating. And in this view the consent of the accused that a sealed verdict may be returned has some significance. But, whether argument proceeds upon one or the other of the grounds stated, it does not reasonably support the idea that the practice pursued involves an essential incident of trial by jury guaranteed by the Constitution. On the contrary, all such argument and the circumstance that the practice differs in different common-law States (so-called), and that in many States a practice has been established by statutes, furnishes persuasive support of the proposition that the whole matter is one of practice, and that there is no constitutional or so-called common-law right of an accused person to have jurors kept together until a verdict is returned into court. There is authority which would require this statement to be qualified to this extent only, that in capital cases the jury should be kept together, a precaution which the accused may not dispense with. An examination of decisions discloses that it is the uniform practice—sometimes statutory—to permit sealed verdicts to be returned where a misdemeanor is charged, in the discretion of the court. This is the rule of the Federal courts.

In *United States* v. *Bennett*, 16 Blatchf. 338, 373, Fed. Cas. No. 14,571, it appears:

"That the direction in writing to the jury that they might deliver a sealed verdict to the officer, and might

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then separate, was exhibited to the counsel for the prisoner before it was sent to the jury by the court; that the jury strictly followed such direction; that the court received the sealed verdict from the officer the next morning, in the presence of the jury and of the defendant, in open court, after the jury had then and there announced that they had agreed upon a verdict and that such sealed verdict contained it; that the verdict of guilty announced and recorded was the verdict contained in such sealed verdict; and that, on the polling of the jury, at the request of the counsel for the defendant, each juror stated that the verdict announced was his verdict."

The opinion proceeds:

"It is laid down in Wharton's Criminal Law (6th Ed.), § 3,125, that, 'in misdemeanors, there is no difficulty, in practice, in permitting the jury to separate during the trial.' In the present case, the statute expressly declares the offense to be a misdemeanor. Wharton cites the leading case of *Rex* v. *Woolf*, 1 Chitty, 401, where it is held that, in a case of misdemeanor, the dispersion of the jury does not vitiate the verdict. *A fortiori*, a dispersion after agreement, and after the verdict is written and signed and sealed up, and where the jury afterwards attend in court with it, and the court receives and opens it, and the jury give an oral verdict in accordance with it, on being polled, does not vitiate the trial. In *People* v. *Douglass*, 4 Cow. (N. Y.) 26 (15 Am. Dec. 332), it is laid down that the mere separation of a jury is not a sufficient cause for setting aside a verdict either in a civil or a criminal case, if there be no farther abuse. In *People* v. *Ransom*, 7 Wend. (N. Y.) 417, 424, it is said that any irregularity or misconduct of the jurors will not be a sufficient ground for setting aside a verdict, either in a criminal or a civil case, where the court are satisfied that the party complaining has not, and could not have, sustained any injury from it. In *Commonwealth* v. *Carrington*, 116 Mass. 37, the question arose whether, in a criminal case, not capital, the jury may be authorized by the court, without the consent of the defendant, to separate after agreeing upon, signing, and sealing up a paper in the form of a verdict, and afterwards return a verdict in open court, in accordance with the result so stated and sealed up. It was held that such a course is proper. The court say:

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"'The tendency of modern decisions has been to relax the strictness of the ancient practice which required jurors to be kept together from the time they were impaneled until they returned their verdict, or were finally discharged by the court. In civil cases the jury are never kept together at the intermissions of the sittings of the court pending the trial, and it is well settled that, after the case is finally committed to them, they may be allowed by the court to separate, if they first agree upon and seal up their verdict, and afterwards affirm it in open court; and that, if their verdict, when opened, does not cover all the issues on which they are to pass, the case may be recommitted to them, and a verdict subsequently rendered will be good. *Winslow* v. *Draper*, 8 Pick. (Mass.) 170; *Pritchard* v. *Hennessey*, 1 Gray (Mass.), 294; *Chapman* v. *Coffin*, 14 Gray (Mass.), 454. But if, upon returning into court, one of the jurors dissents from the verdict to which all had agreed out of court, it cannot be recorded. *Lawrence* v. *Stearns*, 11 Pick. (Mass.) 501. In capital cases, indeed, the uniform practice in this commonwealth has been to keep the jury together from the time the case is opened to them until their final discharge. But the practice is equally well settled, and in accordance with the decisions elsewhere, that, pending a trial for a misdemeanor, the jury may be permitted by the court, without the consent or knowledge of the defendant, to separate and go to their homes at night, without vitiating the verdict. *Rex* v. *Woolf*, 1 Chitty, 401; *King* v. *Kinnear*, 2 B. & Ald. 462; *McCreary* v. *Commonwealth*, 29 Pa. St. 323. If the jury, in the case of misdemeanor, are allowed, without the consent of the defendant, to separate after the case is finally committed to them by the court, and before the verdict is returned, the verdict cannot be recorded, unless it clearly appears that the verdict was not influenced by anything that took place during the separation. It was accordingly held that, where the jury were allowed by the judge to disperse upon stating to the officer they had agreed on and sealed up a verdict, and, upon coming into court, rendered an oral verdict, without any sealed verdict being produced or opened, or its contents made known to the defendant or his counsel, the verdict was invalid. *Commonwealth* v. *Durfee*, 100 Mass. 146; *Commonwealth* v. *Dorus*, 108 Mass. 488. But, when all possibility of improper influences is excluded by conclusive evidence that the jury arrived at and reduced to writing, before their separation, the same result which they afterwards announced in open court, the verdict may be received and recorded. *State* v. *Engle*, 13 Ohio, 490; *State* v. *Weber*, 22 Mo. 321; *Reins* v. *People*, 30 Ill. 256.'"

See, also, *Pounds* v. *United States*, 171 U. S. 35 (18 Sup. Ct. 729). In *Com.* v. *Slattery*, 147 Mass. 423 (18

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N. E. 399), the respondent being accused of rape, and in *Com.* v. *Heden*, 162 Mass. 521 (39 N. E. 181), where manslaughter was the charge, the rule of *Com.* v. *Carrington* appears to have been followed.

In *State* v. *Webber*, 90 Me. 108 (37 Atl. 877), respondent being charged with a misdemeanor, the jury was directed by the court to seal the verdict when they had agreed; suitable blanks being furnished to the officer in attendance for that purpose. The jury agreed and separated. In the morning they came into court and stated that they had no sealed verdict other than that which appeared on the indictment, which was in a sealed wrapper with the following written at the bottom of the indictment: "Guilty as charged in the indictment. Samuel Strout, Foreman." Thereupon the jury rendered their verdict of guilty orally. In considering the exceptions by defendant, the court said:

"In the view of this question, which has uniformly prevailed in the courts of Massachusetts, the only purpose or effect of the written verdict, signed and sealed up by the jury, is to afford conclusive evidence that the oral verdict delivered in open court is substantially the same as the result recorded in the written form, and that the jury were not influenced in arriving at their oral verdict by anything that occurred after their separation. It is accordingly settled in that State that the delivery of the verdict by the foreman of the jury by word of mouth in the presence of the court is an indispensable safeguard in all criminal cases. *Commonwealth* v. *Tobin*, 125 Mass. 203 (28 Am. Rep. 220). But a different view has been adopted by our court. In the 'Anonymous' case reported in 63 Me. 590, the conclusion is reached after careful advisement that in any criminal case, where the offense is not punishable by imprisonment for life, the presiding judge may authorize the jury to seal up their verdict and separate during an adjournment of the court, and have it opened, read, and affirmed at the coming in of the court with the same effect as if pronounced orally; and for this purpose a verdict signed by the foreman in the form there prescribed or in any other substantially equivalent form is declared to be sufficient. In *State* v. *McCormick*, 84 Me.

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566 (24 Atl. 938), this conclusion is reaffirmed, and the practice of requiring an oral verdict in addition to the sealed one declared to be a matter of form rather than of substance. Either course is there said to be legal."

I assume that the Supreme Court of Maine classed offenses punishable by life imprisonment with capital offenses. The Supreme Court of California, in *People* v. *Kelly*, 46 Cal. 355, without giving reasons and without citation of authority, held that the order of the court, authorizing the sheriff to receive from the jury a sealed verdict if they should agree during the night, and upon its receipt to allow the jury to separate until the session of the court on the following morning, would have been error if it had not been consented to by the defendant's counsel at the time it was made. "Having," it is said, "deliberately consented to this irregular form of procedure, the defendant is in no position to complain." In 1 Bishop's New Criminal Procedure (4th Ed.), § 1002, it is said:

"In a part of our States, perhaps in all, by agreement, by order of the court without, or by statutes, if in a misdemeanor case or even in some of the States one of felony not capital, the court has adjourned when the jury have determined on their verdict, they may reduce it to writing, seal it up, separate, and bring it into court on its opening."

A considerable list of authorities cited in the note sustains the various propositions stated in the text.

In my opinion both reason and authority require the conclusion that the whole matter is one of practice, which may be amended by courts or by the legislature without invading any of the guaranteed or essential rights of a person accused of crime; that the essential thing is a verdict of the jury based upon no extrajudicial considerations; that courts may pursue the practice thought to be best calculated to secure such a verdict, adopting, or declining to adopt, in the exercise of a sound discretion, one practice or another, with or without the consent of the accused.

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The same reasoning, if not the same authority, sustains a refusal to classify crimes, by the punishment which may be inflicted or otherwise, for the purpose of determining whether the practice pursued in a particular case was or was not erroneous. The legislature has provided what the practice shall be in cases where murder is charged. It might have provided the same practice for all cases where the offense may be punished by imprisonment for life. It did not do so, and the fact that it did not is persuasive in reaching the conclusion stated.

In the case at bar no intimation is given that the jury did not render an impartial verdict, supported by the evidence and the law. No suspicion of undue influence is averred. The verdict agreed to before separation was the verdict assented to by each juror in open court. The fact that, without the consent of the respondent the jury was permitted to separate, after sealing the verdict, does not, of itself, constitute reversible error.

The conviction is affirmed, and the court is advised to proceed to judgment.

HOOKER, MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred. BIRD, C. J., took no part in the decision.

In re MCMASTER'S ESTATE.

COOPER *v.* HARLOW.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY—COURT RULES.

An assignment of error that the court erred in refusing proponent's requests to charge, numbered first, second, fifth, etc., is sufficiently specific, where the requests are numbered in the bill of exceptions.

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2. SAME—CHARGE OF COURT.

Paragraphs of the court's charge, which are numbered in the bill of exceptions and included in one assignment of error, may be taken distributively.

3. WILLS—UNDUE INFLUENCE—COMPETENCY OF TESTATRIX.

On the trial, on appeal, of the question of the valid execution of a will, by which the testatrix gave to her confidential agent a large bequest and the residuary portion of her estate, assigning a reason therefor which was not correct, it was not error to submit to the jury the questions of undue influence and of mental incompetency, under evidence tending to show that he recommended to her a person to draft the instrument, procured the preparation of the will, was present when it was executed and acted as its custodian until her decease, and that the testatrix was about 80 years of age at the date of its execution.

4. SAME—FIDUCIARY RELATIONS—PRINCIPAL AND AGENT—UNDUE INFLUENCE—PRESUMPTIONS.

It was error to charge the jury that the rule prevailing in ordinary cases, casting the burden of proof of undue influence on contestants, was here reversed and that the presumption of fact arising from the confidential relation borne by the proponent and from the legacy bequeathed to him, required him to show to the satisfaction of the jury that any connection he may have had with the execution of the will was fair and honest.

5. SAME—UNDUE INFLUENCE—EVIDENCE.

Such presumption is one of fact, the force and effect of which is for the jury and which depends in every case upon all the circumstances.

6. SAME—INSTRUCTIONS TO JURY.

It was improper for the trial judge to intimate an opinion in his instructions to the jury that the circumstances presented strong evidence of undue influence.

7. SAME — EVIDENCE — IMPEACHMENT — STATEMENTS OF LEGATEE AFTER EXECUTION OF WILL.

Statements of proponent who was charged with employing undue influence as to matters relating to the execution of the will, made subsequently to the decease of testatrix and conflicting with his testimony on the stand, were competent to impeach him and to support the presumption of undue influence that arose from his relations with the testatrix.

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8. SAME—CHARGE TO JURY—EVIDENCE OF UNDUE INFLUENCE.
A request was properly denied which asked the court to charge the jury that the provisions of the will had no tendency to prove undue influence or fraud, standing alone, where it was impossible to dissociate the instrument from surrounding circumstances tending to show undue influence.

9. SAME—EVIDENCE OF INCOMPETENCY—OPINIONS OF NONEXPERT WITNESSES.
The opinions of witnesses as to the mental incompetency of the testatrix, based on ordinary knowledge and observation, should not have been received in evidence unsupported by sufficient testimony of observed facts and conditions on which the opinion was based.

10. SAME—RELATIONSHIP—EVIDENCE.
Error was committed in receiving evidence of the financial condition and state of health of deceased's cousins who had no claim upon her bounty.

11. SAME.
In view of an attempt to show that the testatrix had demonstrated affection towards a nephew, the exclusion of evidence of reasons known to her for making no other provision for her nephews was improper.

12. SAME—HEARSAY.
A statement of the nephew that he purposed studying hypnotism to hypnotize her and get her to make a will in his favor, was not competent in the absence of evidence that she knew of his purpose, or that he attempted to execute it.

13. SAME—CROSS-EXAMINATION.
Contestants were entitled to subject the proponent to a searching cross-examination, and to ask if he knew of any reason why she made him a legatee.

14. SAME.
A conversation which, standing alone, might not tend to show undue influence, was a proper subject of consideration by the jury with other evidence having such tendency

Error to Jackson; Parkinson, J. Submitted June 29, 1910. (Docket No. 72.) Decided November 11, 1910.

Edmund L. Cooper presented for probate an instrument purporting to be the last will of Sarah W. McMaster, deceased. An order was entered in probate court admitting

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the will to probate, and Arthur O. Harlow and Byron N. Harlow, heirs at law of deceased and legatees under the will, appealed the cause to the circuit court where a judgment was rendered disallowing the will. Proponent brings error. Reversed.

Richard Price (*Thomas E. Barkworth*, of counsel), for appellant.

Wilson & Cobb, for appellees.

Ostrander, J. Sarah W. McMaster, whose maiden name was Harlow, died at Grass Lake, in Jackson county, Mich., August 28, 1907, aged 81 years. She was a widow; her husband having died in 1895. She left an estate, consisting principally of personal property, valued at more than $32,000, owing, practically, nothing. An instrument, executed by her, dated April 21, 1906, was offered for probate as her last will. It was admitted in probate court after a contest made by two nephews and heirs at law, named Arthur and Byron Harlow, but in the circuit court was found by a jury not to be her last will. The nephews asserted the mental incompetency of the testatrix to execute a will and that she was unduly influenced with respect to its terms by Edmund L. Cooper, the proponent, who was nominated executor in the will, was given a specific legacy of $1,000, and was also made the residuary legatee. Mrs. McMaster had no children. Her brother, John Harlow, lived in Grass Lake. Another brother, Oscar Harlow, died in 1890, and his sons are the contestants. Mrs. McMaster also executed, on April 21, 1906, a power of attorney by the terms of which Edmund L. Cooper was empowered to care for her property, transact all of her business, including the collecting, lending, and investment of her money, the assignment and discharge of mortgages, the management and control of real estate. The instrument proposed as her last will bequeathed to each of the nephews above named $5,000 to be paid in annual installments of $1,000. There was a

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bequest of $2,000 to Ella Hatch, a niece of her husband, one of $1,500 to her cousin, Clarence McFarran, one of $5,000 to the First Congregational Church of Grass Lake, besides the one of $1,000 to Edmund L. Cooper, and none of these were made payable until one year after her death. The bequest to the church is in trust, with directions to invest the money in first mortgages on real estate and to use the income only to pay the salary of the minister. Cooper was made trustee of the fund. The clause disposing of the residue of the estate contains the following sentence:

"This provision is made because of the many acts of kindness of said Cooper, for favors shown to me by him, and for work and labor performed for me by him, which services have been rendered freely and without proper compensation."

It is the testimony of Mr. Cooper that he received a note from Mrs. McMaster asking him to come to her house; that he went to her house on the same day and learned from her that she desired him to prepare her last will. She had made a memorandum, upon paper, indicating her wishes in that behalf, and on account of the nature of the bequest to the church he advised her that he did not consider himself competent to prepare the will. She asked him if he could get some one to prepare it. He mentioned the name of a person, and did in fact take a memorandum made by himself to a suitable person who prepared the will and mailed it to Cooper. He took it to Mrs. McMaster, left it with her, and later, on the same day, went again to her house, when the will was read to her by him and was executed. The witnesses were suggested by Mrs. McMaster and were invited to her house by Mr. Cooper. The will was not read by them or in their presence. The person who prepared the will prepared the power of attorney, and one of the witnesses to the will also witnessed the execution of the power of attorney. The will, after its execution, remained with the testatrix until June 17, 1907, when, with some other

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papers and some money, it was delivered to Cooper in an envelope prepared by him for it. It remained unopened until after the death of Mrs. McMaster. There was introduced some testimony, including opinion evidence, respecting the physical and mental condition of the testatrix at about the time the will was executed and thereafter; but it is about Mr. Cooper and his relations with Mrs. McMaster that the case is made to revolve. He was not a relative of the testatrix or of her husband. At the time of the trial he was 67 years old and had lived all of his life excepting five years in Grass Lake. He was in the dry goods trade there for 13 years and thereafter had been cashier of the Farmers' Bank for 12 years. In October, 1904, Mrs. McMaster made her first deposit in that bank, in the savings department. Before that time Mr. Cooper had known her. They attended the same church. The trial court submitted to the jury both the question of the mental competency of the testatrix and the question whether she had been unduly influenced in making disposition of her property. It is the contention of proponent, appellant, that the testimony did not warrant the submission of either of these questions to a jury, and, further, that if these questions were for the jury the jury was improperly instructed, and testimony was both admitted and rejected by the court without warrant.

This court is met by the objection that most of the points argued in the brief for proponent are based upon no special assignment of error. Supreme Court Rule 11. For example, the thirty-fifth and the fortieth assignments of error, the alleged basis for the most considerable arguments presented, read as follows:

"(35) The circuit judge erred in refusing to give the following requests of proponent, to wit: First, second, fifth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth, twentieth, twenty-first, twenty-second, and twenty-fifth."

"(40) The circuit judge erred in charging the jury as stated in the seventh, ninth, forty-seventh, forty-eighth,

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fifty-sixth, fifty-seventh and fifty-eighth, and fifty-ninth paragraphs of his charge, on the subject of undue influence and the burden of proof."

The charge of the court appears in the record in paragraphs numbered consecutively from 1 to 73. These assignments may be taken distributively, since the requests appear, numbered, in the bill of exceptions, and the references to portions of the charge are as conveniently made by numbered paragraphs as by repetition of the language used. The brief affords the aid the failure to do which was criticised in *Duff* v. *Judson*, 160 Mich. 386, 391 (125 N. W. 371), and as to the fortieth assignment each paragraph of the charge referred to relates to a rule of evidence precisely opposed to the one which proponent was insisting should be given to the jury. See, also, *Niles* v. *Rhodes*, 7 Mich. 374.

It has been stated that the case was made to revolve about Mr. Cooper and his relations with the testatrix. I am impressed that if Mr. Cooper had not been made residuary legatee, if relatives or if charities had received the portion of the estate which comprises the residuum thereof, there would have been no contest about her will, because there is very little testimony, other than the will itself, considered with the relations of Cooper and the testatrix, which can be said to have any tendency to prove the testatrix incompetent to make a last will, and none other tending to prove the exercise of undue influence. The will itself and the circumstances attending its execution lead one, naturally, to inquire: *First*, whether, Mrs. McMaster understood the effect of the instrument; and, if she did, *second*, what prompted her to give to Mr. Cooper nearly one-half of a considerable estate, solemnly assigning as a reason therefor a fact which did not exist and could have been considered by her as existing only through misapprehension? The inquiries suggested were pursued at the trial with such result that the court, in my opinion, was required to submit to the jury the question whether undue influence had been exercised in procuring

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the will to be made, and, also, though I reach this conclusion with some hesitation, the question of the mental competency of the testatrix. Mental competency, in this case, includes ability to understand the meaning and effect of the residuary clause of the will and may involve, depending upon how the jury view the testimony, including the will itself, the ability to detect fraud, if fraud was attempted. Undue influence may be exerted to prevent the detection of fraud, may amount to fraud, may be strong enough to secure the provisions desired, although fraud is detected or suspected, and confidence may accept and may be relied upon to accept untruthful and fraudulent explanation. 1 Woerner's American Law of Administration, p. 44 *et seq.* It is apparent here that it is in fact impossible to wholly separate these issues. Whether they were properly developed and properly presented to the jury are questions to be, to some extent, considered.

The court instructed the jury that proponent was bound to prove that the testatrix was competent to make the will, and, in ordinary cases, the contestants were bound to prove undue influence, if undue influence was asserted. They were further instructed with respect to the burden of proving undue influence:

"Whether this rule is reversed or not in such a case as this, the connection of Mr. Cooper with the making of this will, and its execution, and the facts of his being a large beneficiary, and is named as executor, as well, also, as the relations he entered upon toward Mrs. McMaster at the time the will was executed and such as he sustained toward her at that time to the extent that these things are undisputed in this case, make up such a situation as calls upon Mr. Cooper for satisfactory explanation, and he should show to your satisfaction that it was in all respects fair and honest. The burden of doing this is upon him, and, if he has failed to satisfy you by his explanation that it was fair and honest, you should find against the will without reference to any other question in this case, or any other instruction given you, and in fact need proceed no further with your deliberations. If you do not so find, you should then consider other elements in the case."

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In substance the instruction above referred to was repeated, and in addition the jury was instructed as follows:

"After the proponent had sworn the two witnesses to the will, the contestants took the case. At that time I struck out testimony already given as to what Cooper did and said after the funeral, and at the bank, about the will or his knowledge or lack of knowledge of it, and refused to admit other like testimony at that time, thinking the rules of law excluded it, but holding it could be used only to contradict Mr. Cooper, provided he made denials of such claims as to his actions or statements. If my first view was correct, I should caution you not to use such evidence except to enable you to judge of the credibility of Mr. Cooper's testimony as a witness. But I now believe I took too narrow a view of the legitimate use of such testimony and ought to have received it in the first instance. That testimony is now in the case, and you have the right to consider it not only as bearing upon Cooper's credibility as a witness, but also as substantive evidence of what he did and said, as affording such light as you deem it may reflect on the character of the will and the way it came to be made. Mr. Cooper, at the time of the reading of the will, was in the presence of the heirs at law, who would take the property had there been no lawful will, and some of the legatees who were interested on that account. Apparently he produced the will and was voluntarily reading it for the information and benefit of those interested. He was himself the largest beneficiary; he was named as executor in the will. He was not a relative. He was the trusted agent of Mrs. McMaster and in charge of her property, much of which was then in his custody. He was asked certain questions by those entitled to know. If Mr. Cooper was willing to speak at all or assume to give any information or make any statement, it was his duty to speak the truth. If you believe that he made the statement testified to, it is conceded that he concealed his actual knowledge and made positive false statements as to his lack of knowledge of what was in the will, or that he was a beneficiary, as to his knowledge of the draftsman or how it came to be drafted, and also at that time, or some other time or place not remote, did not disclose fairly his knowledge as to the value or extent of her estate and the amount he would be likely to derive from

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the residuary clause. I think, in view of the circumstances, if he spoke at all, he should have spoken the truth, and not have resorted to any subterfuge, concealment, or misstatement. He should have been fair and frank. The question then arises: Why did he do this? You have the right, and it is your duty, to ask and consider this question. And I think those people had the right to ask questions as to the will and the estate and to have such questions answered by Mr. Cooper so far as he could fairly answer them, and answer truthfully. He chose, for some reason, not to do so. Why? What was the reason? Mr. Cooper has explained on the stand or testified in reference to what he did and why he did it. You are the judges as to how satisfactory or sufficient such explanation is. And in considering that answer or those explanations or reasons, you have the right, in the same connection, to take into account Mr. Cooper's experience as a business man and in respect to estates and wills, his character and standing in the community, his relations to the will and to the testatrix, and his interests and the extent of such interests, and whether they might—that is, his interests—be involved in or affected, and, if so, to what extent, by a truthful disclosure, to the end that you rightfully discern so far as possible what the real motive was that induced a man of Mr. Cooper's standing in the community to depart from the truth or attempt to suppress or conceal the truth, and in such a way, upon such an occasion. Was it because he feared the truth would imperil his interests, or some other or lesser motive? If from fear, what was there to fear from the truth, and the entire truth? Or was it for some trivial or unimportant or merely imaginary or fanciful reason that he was ready to make untruthful statements tending to mislead those who were entitled to correct information, if entitled to any from him? I state this circumstance or episode in the course of his dealings in respect to this will, not for the purpose of intimating anything of its significance or lack of it, but because it is your function and duty to consider it and give to it its real weight or influence, but no more. Do not forget or overlook what Mr. Cooper says about it. Consider his own statements and explanations in reference to it and in connection with the circumstances and situation that confronted him, as well as what he did and said at the time, to the end that you assign to it only such meaning or significance as actually and justly

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should attach to it. And you may also consider it in connection with the other evidence as to his relations to the making of the will, the part he took in it, and his interests in it, to which I have already made reference, and unless upon the whole you are able to say that the evidence on both of these phases of Cooper's conduct, so taken in connection, satisfies you upon the whole that the will is not the product of undue influence exerted by Cooper upon the testatrix, but is free from such infirmity, your verdict should be against its allowance. I say this because I believe it to be the law that Mr. Cooper has the burden of satisfying you that the will in its making was in all respects fair and honest, and also of explaining his conduct at the time of the reading and also statements about the time of the funeral so far as you deem them proven, so as to warrant a favorable inference or conclusion, or at least prevent your drawing of inferences or conclusions fatal to his contentions. If his connection with the making of the will is not shown to you satisfactorily to have been fair when considered in connection with these latter untrue statements or declarations, so that upon the whole, all taken together, you are not able to say the will is not due to his undue influence, your verdict should be against it, and for the contestants, even if you could not so find from either of these circumstances or considerations considered separately, as under those circumstances it is his duty to show that the will when made was free from the alleged infirmity of undue influence on his part. If he has so explained these things to your satisfaction, then you should not find against the will on the ground of his exercise of undue influence for either of those reasons, or those reasons combined."

I am impressed that, in that portion of the charge which is first above recited, the learned trial judge intended to state a rule in harmony with the decisions of this court and with the weight of authority. *In re Bromley's Estate*, 113 Mich. 53 (71 N. W. 523); *Dudley* v. *Gates*, 124 Mich. 440, 446 (83 N. W. 97, 86 N. W. 959). The trouble with the instruction is that it does not also advise the jury, as it should have done, that if, in view of all circumstances disclosed, giving effect to the presumption referred to, they are not convinced that the provisions of the will favorable to Mr. Cooper were the result of fraud-

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ulent contrivance or of undue influence, then, if the testatrix was competent to make the will, it ought to be allowed. The jury must have understood that in this case the contestants were relieved of a burden which in the ordinary case they would be obliged to carry. The attention of the court was directly drawn to the rule, so that lack of a fuller statement of the law was not the fault of counsel. As for this error the cause must go down for a new trial, it is proper to say, further, that the presumption recognized in the decisions and in this opinion arising from the preparation of a will by a beneficiary whose relations with the testator are confidential or fiduciary in character is a presumption of fact, the force and effect of it is for the jury and depends in every case upon the circumstances of the case. Certain circumstances will give rise to slight, and others to very grave, suspicion of wrongdoing. Slight evidence may remove or rebut the presumption in one case, while in another the presumption may become, in the face of all explanation, conclusive. It is therefore a delicate, and often a dangerous, thing for a trial court to intimate or to express any opinion concerning the force and effect of the presumption or to define or in argumentative form to state how much or what evidence is necessary to rebut it. The charge of the court, considered in its entirety, tends rather strongly to impress the jury that the circumstance that a considerable legacy was given to Cooper and the one that he was instrumental in procuring the will to be drawn are considered very strong evidence of wrongdoing, when the force and weight of the presumption was for the jury and in their judgment, all the circumstances being considered, and the mental strength of the testatrix, if they believed her to be competent to make the will, may have been entirely rebutted by the testimony and the character of proponent.

To the portion of the charge last above set out, other objections are made. It is said the court gave to the testimony referred to in the charge an effect forbidden by

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the rule stated in *O'Connor* v. *Madison*, 98 Mich. 183 (57 N. W. 105). See, also, *In re Estate of Lefevre*, 102 Mich. 568 (61 N. W. 3): *Roberts* v. *Bidwell*, 136 Mich. 191 (98 N. W. 1000). In *O'Connor* v. *Madison* an attempt was made to prove undue influence by testimony of statements of devisees. As in this case, there were several interested in sustaining the will, and it was held that the testimony was properly excluded. The court was requested to charge:

"Some testimony has been introduced as to statements made by Mr. Cooper subsequent to the making of the will, and particularly at, or about, the time that the will was read; but I charge you that these statements, if you find that they were made, have no tendency whatever in this case to establish any undue influence or fraud practiced upon Mrs. McMaster at the time of making her will, and should not be considered by you, and no weight should be given them in the consideration of the question of undue influence, and neither should any weight be given by you to any acts or conduct of Mr. Cooper at or about the time of the reading of the will so far as the question of undue influence is concerned, as they have no bearing upon that subject."

The testimony was competent if for no other reason than that it tended to prove statements of the witness contradicting material testimony already given by him at the trial. Being competent for this purpose, the rule of *O'Connor* v. *Madison* would not require it to be excluded. Whether the jury should have been instructed to consider it only as it was believed to affect the credibility of Mr. Cooper is a more serious question. I am of opinion that an instruction to that effect would have been error. Whether the disposition of property made by the testatrix was the natural operation of the mind of the testatrix, or the result of fraudulent contrivance or undue influence of Mr. Cooper, depended, in view of the presumption indulged, and which has been referred to, upon facts which he testified he had knowledge of and which he had related. If he had made statements denying or concealing such

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knowledge, upon occasions where an honest man in his position would be likely to speak the truth, the effect would be, perhaps, not only to discredit his testimony as a whole, but to create the suspicion that there was a reason not creditable to him for concealment and prevarication. The point presented is not simply the one of receiving or rejecting the extrajudicial statements of one of several legatees concerning the exercise of undue influence upon a testatrix whose will is proposed for probate. In all cases of the nature of the one at bar, the primary fact to be discovered is whether the instrument proposed as a will is the intelligent act of the deceased, and the interests of those asserting and contesting the existence of this fact are of secondary importance. When the fact depends in any considerable degree upon the conduct and good faith of a legatee, so much so that he becomes a necessary witness to sustain the will and to rebut a presumption that undue influence was exercised by himself, no arbitrary rule should be interposed to inquiry which will discover precisely what his conduct and influence has been. Without intending to limit or modify the rule of *O'Connor* v. *Madison*, I think it should not be extended in such a way as to require that the instruction requested be given. The charge which was given upon this subject is faulty, not because it violates the rule referred to, but because in effect it reiterates the advice that the burden of proof has shifted upon the question of undue influence, and, it may be added, is somewhat argumentative.

The jury was instructed that they might consider the provisions of the will with respect to both issues submitted to them, and the court directed attention to the reason given in the residuary clause thereof for the provision there made. The court was requested to say that the provisions of the will standing alone had no tendency to show undue influence or fraud, and that they should not regard the disposition of property which was made therein as any evidence of undue influence. The cases of *In re Hoff-*

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mann's Estate, 151 Mich. 595 (115 N. W. 690), and *Russell* v. *Carpenter*, 153 Mich. 170 (116 N. W. 989), among others, are cited. That these cases are not in point here will be obvious to one who will examine them. Unless the provisions of the will were considered in connection with the relations of Mr. Cooper and the testatrix and his procuring the will to be drawn, the presumption which has been referred to, and which the court rightly told the jury might be indulged, would have no foundation. The instruction was properly refused because it was impossible to consider the terms of the will dissociated from the other circumstances disclosed.

The other errors assigned and argued have been considered. In view of a new trial, it is not important that they be, all of them, noticed in this opinion. Some rulings complained about are likely to be required upon a new trial, and to these I refer. Certain witnesses, after stating their observations of the testatrix, were permitted to express an opinion as to her mental competency. It is often a nice, always an important, matter to decide whether opinion evidence ought to be received from non-professional witnesses. It was proper to show the age, and the physical and mental condition, of testatrix as it was observed by the witnesses, and I am of opinion that in neither case was the opinion expressed warranted by the observations and conditions stated. Nor is it likely that the jury considered them of much value.

Testimony of the financial condition and the health of some cousins of testatrix was received over objection; the purpose of the testimony being, evidently, to show that they were in needy circumstances for whom testatrix might have made some provision in place of the one to Mr. Cooper. Their exact relationship to testatrix is not shown, nor that they, or any of them, had particular or any claim upon her bounty. I think this testimony should have been excluded. *In re Merriman's Appeal*, 108 Mich. 454 (66 N. W. 372). It was error, also, in view of the issue presented, to exclude testimony tending to prove

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that reasons existed, known to testatrix, for making no other provision than she did for her nephews. An attempt had been made to prove that the demonstrations of testatrix towards one of the nephews indicated considerable affection for him. But it was right to exclude testimony of a statement made by this nephew, not within the knowledge of testatrix, that he proposed to study hypnotism for the purpose of hypnotizing her and getting her to make a will in his favor. It is not claimed that he did study this subject or ever attempted to practice it or that he could have practiced it if he had pursued the study indefinitely.

Contestants were properly entitled to subject the proponent to a searching cross-examination, and while it might properly have been limited, upon some objections, where it was not, it cannot be said that reversible error was committed. In view of the residuary clause, it was not error to permit the witness to answer the questions:

"*Q.* Then there was no reason in the world, as far as you know of, why she ever made you a legatee under her will?

"*A.* I don't know why she did.

"*Q.* I say there is no reason in the world why she should have done so, as far as you know?

"*A.* No, sir; that I know of."

The twenty-first request to charge was properly refused. Standing alone, the conversation referred to therein would have had no tendency to establish either mental incompetency or undue influence. It did not stand alone, when the request was preferred, and, if the jury believed that such a conversation took place, it was proper to consider it with other testimony in determining the issues involved.

The judgment is reversed, with costs to proponent, and a new trial granted.

Bird, C. J., and Moore, Brooke, and Blair, JJ., concurred.

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BEACH v. BUSINESS MAN'S PUBLISHING CO.

1. PARTNERSHIP—LIMITED PARTNERSHIP ASSOCIATIONS—AUTHORITY OF GENERAL MANAGER—CONTRACTS.

   An oral contract made by the manager of a limited partnership association to hire plaintiff for a year at an annual salary of $2,000, is void under 2 Comp. Laws, § 6083, providing that no liability exceeding $500 shall be binding on the association unless reduced to writing and signed by at least two managers.

2. SAME—RATIFICATION—ESTOPPEL.

   And the contract is not valid by estoppel where the association was engaged in business other than the buying and selling of merchandise, and the contract did not relate to the purchase or sale of the same.

3. SAME—OFFICERS.

   The general manager of an association engaged in buying and selling merchandise may not be authorized to create a liability of over $500 against the association for other purposes than buying and selling merchandise. *Rhoades* v. *Pure Food Co.*, 149 Mich. 235 (112 N. W. 940).

Error to Wayne; Donovan, J. Submitted June 29, 1910. (Docket No. 151.) Decided November 11, 1910.

Assumpsit by Clare M. Beach against the Business Man's Publishing Company for breach of a contract of hiring. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Rowland M. Connor, for appellant.

Benjamin S. Pagel, for appellee.

BIRD, C. J. Plaintiff recovered a judgment for $809.72 against the defendant in the Wayne circuit court for salary which he claimed was due him on a yearly contract of employment.

The defendant is a partnership limited, organized and

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authorized to do business under chapter 160, 2 Comp. Laws. The object of the partnership, as set out in its articles of association, is:

"A general publishing, bookselling and office supply business, including the publication of a monthly journal or magazine."

On the 27th of November, 1903, plaintiff entered into an oral agreement with the general manager of the association to work for the partnership for a salary of $2,000 a year. He went to work under this agreement, and continued to work under it until May 8, 1908, at which time he was ordered by the board to resign. He proffered his services for the balance of the year, but they were refused. After the year had expired, he brought this suit to recover the balance of his salary for the year ending November 27, 1908, and for certain moneys which he had disbursed for expenses in its behalf.

The most important question raised by the assignment of errors is whether the general manager of defendant had the authority to employ plaintiff on a yearly contract involving $2,000.

It is contended by defendant's counsel that the general manager did not have this power by reason of the inhibition of the statute under which the association is organized. This statute provides, in part, that:

"No debt shall be contracted nor liability incurred for said association except by one or more of said managers, and no liability for an amount exceeding $500, except against the person incurring it, shall bind the said association unless reduced to writing and signed by at least two managers, except in case of associations for the purpose of buying and selling merchandise, a majority of the interest in such association may select one of the managers each year to purchase merchandise required in the business of the association, make contracts, and sign notes for the same: *Provided*, such power given in writing fully setting forth the extent to which such manager may make purchases and contract debt for the association, which shall be signed by the majority of the members in number

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and value of their interest, and such power of purchasing and contracting debts shall be strictly limited to the ordinary business of the association." Section 6083, 2 Comp. Laws.

The contract was oral and involved more than $500. It does not appear that Elmer Beach, the general manager, had been given written authority to make the contract. Defendant claims that these facts bring the case within the ruling of *Citizens' Sav. Bank* v. *Vaughan*, 115 Mich. 156 (73 N. W. 143). In answer to this contention, plaintiff says that the contract was one which the association had the power under the statute to authorize the general manager to make, and that the association is now estopped from saying that it did not authorize the contract by reason of permitting its general manager to deal with plaintiff for his services in the way he did for so many years. Plaintiff's contention is that the case is ruled by *Armstrong* v. *Stearns*, 156 Mich. 597 (121 N. W. 312).

To determine which one of these contentions is correct, it will be necessary to construe that part of the statute which reads as follows:

"Except in case of associations for the purpose of buying and selling merchandise, a majority of the interest in such association may select one of the managers each year to purchase merchandise required in the business of the association, make contracts, and sign notes for the same."

Under this language, can the association authorize the general manager to make a contract which involves more than $500, except for the purchase of merchandise? This question seems to have been settled in *Rhoades* v. *Pure Food Co.*, 149 Mich. 235 (112 N. W. 940). That was a case in which the same question was involved. Suit was brought by the plaintiff to recover for services against a partnership limited, whose object was to buy and sell merchandise. Mr. Justice BLAIR held in that case that no recovery could be had, and gave two reasons therefor, one of which was that the contract was void un-

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der the statute, citing *Citizens' Sav. Bank* v. *Vaughan*, *supra*. From this construction it necessarily follows that the power conferred upon the general manager by the association to make contracts involving more than $500 must be limited to *merchandise contracts*. The contract in the case before us is one of hiring and must be declared void under the statute.

The judgment of the trial court is reversed, and a new trial ordered.

BROOKE and BLAIR, JJ., concurred with BIRD, C. J.

OSTRANDER, J. I concur in the result upon the ground the association defendant is not one for the buying and selling of merchandise within the meaning of the statute. I think, too, that no new trial should be granted.

MOORE, J., concurred with OSTRANDER, J.

CITY OF DETROIT v. GRAND TRUNK RAILWAY OF CANADA.

1. HIGHWAYS AND STREETS—IMPROVEMENTS—DAMAGES—EMINENT DOMAIN.

   In separating the grades of a street and railroad under 1 Comp. Laws, §§ 4229–4261, as amended by Act No. 268, Pub. Acts 1909, the municipality does not exercise the power of eminent domain, and damages are not determinable in accordance with rules governing awards in cases where private property is taken for public purposes.

2. EMINENT DOMAIN—CONSEQUENTIAL DAMAGES.

   Consequential injuries resulting from a separation of grades in accordance with statutory authority do not constitute a taking of private property within the meaning of the Constitution.

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3. SAME—STREETS—IMPROVEMENTS.
Improvements authorized by law, made by a city, in or upon public streets, impose no liability for damages resulting to adjacent property owners, unless the legislature so provides.

4. SAME—CONSTITUTIONAL LAW—STREETS.
The legislature has complete control over the highways of the State and what is done lawfully upon them cannot be considered a nuisance, and consequential injuries resulting from what is done are *damnum absque injuria*.

5. SAME—MUNICIPAL CORPORATIONS.
Under the statute the city of Detroit has power to make such separation of grades where railroads cross public streets, and a remedy is provided for consequential injuries to abutting property.

6. SAME—CONSTITUTIONAL LAW.
Nor is the statute in violation of the constitutional provisions relating to the exercise of eminent domain.

7. SAME—RAILROADS—SEPARATION OF GRADES.
Act No. 268, Pub. Acts 1909, providing that in separating the grades of streets and railroads at crossings, the petition may be filed within one year after the separation is completed, has a retroactive effect and is not unconstitutional.

Certiorari to the recorder's court of Detroit; Connolly, J. Submitted June 28, 1910. (Docket No. 160.) Decided November 11, 1910.

Petition by the city of Detroit for the separation of grades of Sixteenth street and certain railroads crossing it. A judgment for defendants dismissing the petition is reviewed by petitioner on writ of certiorari. Reversed.

P. J. M. Hally and *Richard I. Lawson*, for petitioners.

Henderson, Martindale & Grose, for respondents.

Sixteenth street, in Detroit, is crossed, formerly at grade, by three railroads. Pursuant to the statute (2 Comp. Laws, §§ 4229–4261), the city of Detroit entered into an agreement with the railroad companies for a sep-

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aration of grades, at various points, including one on Sixteenth street. The common council, by ordinance, established a new grade for this street. Work incident to the separation of grades was begun June 3, 1907, and was completed August 29, 1908. The statute petition was not filed by the city until August 19, 1907, and when filed it included the proposed separation of grades, not only at Sixteenth, but also at Fourteenth and Fifteenth streets. In June, 1908, a jury was impaneled and sworn to consider the matters alleged in the said petition and was discharged, and the petition was dismissed under a construction of the statute which required a separate proceeding and jury with respect to each street. The action of the recorder was approved by this court. *City of Detroit* v. *Dailey*, 156 Mich. 9 (120 N. W. 25). A separate petition relating to the separation of grades on Sixteenth street was filed April 21, 1909, a jury was impaneled January 31, 1910, and some testimony having been introduced, and it appearing that the improvement had been completed before the petition was filed and before the necessity therefor had been determined by a jury, the jurisdiction of the recorder was challenged by one or more of the respondents. It did not appear, and it is not claimed, that in changing the grade of the street any abutting property was taken, unless the consequential injuries attending the change of grade are to be considered as amounting to a taking.

By Act No. 268, Pub. Acts 1909, the statute above referred to was amended, and as amended it provides that, if the petition is filed within one year after the separation of grades is accomplished, it shall be deemed a compliance with the law. A written opinion was filed by the recorder, which appears in the record, the conclusion and effect of which is that, because the petition was filed after the work of separating the grades was finished, the petitioner was a trespasser *ab initio* and as such liable to respond in damages to respondents in a proper forum. With respect to the amending statute, the recorder held

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it could not operate retrospectively, and, if it could, the legislature had not the power to pass a law permitting private property to be taken before the public necessity therefor is determined by a jury. The opinion proceeds upon the theory that the effect of the improvement is a taking of private property for public uses within the meaning of the Constitution. The contention of respondents in this court is expressed in their brief in the following language:

"If these works proceed under the power of eminent domain, they are restricted and governed by the constitutional provisions of both the Constitution of 1850 and 1909. If they do not so proceed, then the doctrine of *City of Pontiac* v. *Carter* (32 Mich. 164) applies, and the legislature would be free to adopt such remedial legislation, and to amend it, as it chose, because vested rights would not be divested, and the rules of procedure and damages would be wholly within the legislative discretion. But if the power is exercised under the power of eminent domain, if it is subject to those constitutional provisions touching this power, then neither the legislature nor the courts may abridge or infringe upon the procedure commanded by the Constitution, nor upon the damages fixed by the Constitution, which demands full compensation. Restriction by legislation of full and adequate compensation would violate the constitutional provisions relating to eminent domain, and the constitutional provision against depriving a person of his property without due process of law."

OSTRANDER, J. (*after stating the facts*). The act "to provide separate grades for railroads and public highways and streets where railroads intersect such highways and streets," which became effective August 28, 1893 (Act No. 92, Pub. Acts 1893), has a general purpose, which is very plain; but the legislative methods for effecting the purpose are not simple, and some of the provisions of the law are not harmonious. For example, it seems to be wholly incongruous to require that the necessity for the separation of grades according to a plan which embraces such an improvement at several parallel streets should be sub-

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mitted to successive juries; the necessity for a separation of grades at one of the streets involving its necessity at the other streets. This incongruity is more apparent now when a failure to determine the necessity for the improvement ahead of the work of improvement at a particular street is relied upon by owners of abutting property to support the claim that the city has proceeded unlawfully, is a trespasser, and liable to respond in damages as such. And yet very good reasons may be suggested for requiring different juries to assess the damages which the act contemplates shall be paid. Considering all of the provisions of the act together, we felt obliged to hold, in *City of Detroit* v. *Dailey*, already referred to, that successive juries were contemplated by the law.

Since proceedings were first instituted in the city of Detroit to bring about the separation of grades in conformity with the act, this court has been repeatedly called upon to determine disputes arising, in most cases, upon the proper construction of the law. Attention has necessarily been given to the particular questions raised upon the several records and argued by counsel, and just as necessarily decision has been influenced by the accord of opposing counsel with regard to the meaning of certain provisions of the law and the apparent soundness of the arguments when they have disagreed. *City of Detroit* v. *C. H. Little Co.*, 141 Mich. 637 (104 N. W. 1108); *Id.*, 146 Mich. 373 (109 N. W. 671); *City of Detroit* v. *Railway*, 156 Mich. 106 (120 N. W. 600); *City of Detroit* v. *Railroad Co.*, 156 Mich. 121 (120 N. W. 592); *City of Detroit* v. *Snyder*, 156 Mich. 511 (121 N. W. 258); *Id.*, 159 Mich. 227 (123 N. W. 1106). It is said by counsel for the city that in none of these cases was the necessity for the improvement and the damages to be awarded determined before the improvement was actually undertaken. In all of them an award was made by a jury in proceedings under the act, and the points presented for decision related to the class of persons, determined by interest in property, entitled to damages and the measure of the

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damages recoverable under the statute. Whatever may be thought of some expressions to be found in the opinions which have been filed and to which reference will be made, there can be found in the decisions themselves no reasonable support for the idea that in making the improvements the city exercised the power of eminent domain, or that it was acting without proper authority. The contention that damages under the act should be measured in accordance with rules governing awards in cases where private property is taken for public uses has been expressly overruled. *City of Detroit* v. *Railway*, *supra*.

Counsel for respondents find in some of the earlier opinions of the court, in cases involving improvements in highways, and in some of those delivered in cases arising under the particular act, support for the idea that the consequential injuries resulting from such improvements as are here involved constitute a taking of private property within the meaning of the Constitution and require affirmance of the order appealed from. A brief reference will be made to them. In *Schneider* v. *City of Detroit*, 72 Mich. 240, 245 (40 N. W. 329, 331 (2 L. R. A. 54)), it was said by Mr. Justice CHAMPLIN:

"If the common council of the city of Detroit had authority to construct the bridge over the railroad tracks, all their proceedings having been regular, and the bridge and approaches having been erected according to the plans adopted, the city is not liable in this action."

City of Pontiac v. *Carter*, 32 Mich. 164, is cited and, in the case supposed by the learned justice, would, it is stated, control. In that case the city had carried Thirteenth street over the tracks of the railroad company by a bridge erected in the street. What is denied is the authority of the city, express or implied, to erect the structure under the conferred powers to grade, improve, or extend streets. This reasoning of two of the justices left the city liable in damages as for a taking of private property and in this result the other justices concurred. See *Phelps* v. *City of Detroit*, 120 Mich. 447, 450 (79 N. W.

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640). In *Harper* v. *City of Detroit*, 110 Mich. 427 (68 N. W. 265), very like in its facts to *Schneider* v. *City of Detroit*, it was held that the damages recoverable were those fixed by the act now under consideration. In *Ranson* v. *City of Sault Ste. Marie*, 143 Mich. 661 (107 N. W. 439, 15 L. R. A. [N. S.] 49), it was expressly found that the city "was not, and did not, in fact, suppose that it was proceeding in the exercise of any charter power of the city over its streets or to erect bridges." The language relied upon in the opinion in *City of Detroit* v. *Snyder*, 156 Mich. 512 (121 N. W. 258), the case being an appeal from an award in proceedings to separate grades, is:

"This statute did not contemplate a grade to be made for the purpose of ordinary travel, unobstructed by railroad crossings or canals. It contemplated a change made necessary by the use of the streets for railroad crossings. Such improvements do not come within that rule of the common law which gives no compensation or damages."

Schneider v. *City of Detroit* is cited. The city urged that, because no grade had been established on the street upon which Snyder's property abutted, he was not entitled to any compensation under the statute, and the contention was determined in the language following that above set out, which was:

"We are therefore of the opinion that the term 'grade' in this statute refers not alone to those duly established by engineers and municipalities, but also to the grades of highways and streets as in common use."

This decision was made some time after *City of Detroit* v. *Railway* had been decided, and Justice GRANT, who wrote the opinion, took part in and approved the decision in the earlier case. In the *C. H. Little Co. Case*, which was twice before this court, the article and sections of the Constitution relating to the exercise of the right of eminent domain were cited in one opinion, and various authorities, all relating to condemnation proceedings, were cited in the other opinion. What was involved in the first appearance here of the case was the right of a lessee

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to recover damages, and at its last appearance there was involved the measure of the statute damages.

Whatever authority there may be for the doctrine that, if a city acts without legislative authority with respect to its streets, it must respond in damages to those whose use and enjoyment of abutting property is in consequence restricted or injuriously interfered with, none of the cases relied upon and none that have been brought to our attention support the proposition that improvements and changes made in the streets, by legislative authority, impose any liability unless the legislature so declares. In *Austin* v. *Railway*, 134 Mich. 149 (96 N. W. 35), there was a disagreement of the judges as to the proper result to be declared; but it is apparent there would have been no disagreement if it had been conceded that the grade of the highway had been changed by proper authority. The consequences of the acts complained about in that case were not unlike those which are relied upon here to show injury. The case is, in any event, an authority opposed to the contentions of respondents here. It seems to be unnecessary to say that the legislature has complete control over the highways of the State, that what is done in and upon them by lawful authority cannot be considered a nuisance, and that consequential injuries resulting from what is so done are *damnum absque injuria*. The fact that some of the consequential injuries resulting where property is actually taken in condemnation proceedings are similar in character to those resulting where grades are separated furnishes no argument to support the proposition that property is "taken," within the meaning of the constitutional provisions here relied upon, when such consequential injuries follow a separation of grades. The decision of *City of Pontiac* v. *Carter*, is only an application of the rule that if the municipality has power, derived from the legislature, to accommodate streets to a new use consistent with and in aid of the general use to which streets are devoted, abutting owners, whose property is not taken, have no remedy for consequential injuries un-

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less the legislature gives them one. It is obvious that the city of Detroit had power to make a separation of grades. It is equally obvious that the legislature provided a remedy for injuries to abutting property. In previous decisions we have considered the nature and extent of the remedy, and we see no reason for modifying views which have heretofore been expressed. If respondents were suing to recover damages, the statute measure would furnish the measure of their recovery. It may be added that the amendment of 1909 was plainly intended to have a retroactive effect and may be given such effect without doing violence to settled rules. *Matter of Andersen*, 178 N. Y. 416 (70 N. E. 921).

The order and decree of the recorder's court is reversed, and the record will be remanded, with directions to proceed in accordance with the statute. The printed record does not advise us whether all of the respondents appeared, answered, and took part in the hearing below. The city will recover costs, and the order of this court will recite which of the respondents are liable therefor.

BIRD, C. J., and MOORE, BROOKE, and BLAIR, JJ., concurred.

RYERSON v. PHELPS.

1. INTOXICATING LIQUORS—EVIDENCE—CIVIL-DAMAGE LAW.
   Evidence that plaintiff's husband procured intoxicating liquor of defendant through the agency of her minor son, who testified that he thought the husband took a drink at the time, with testimony that he was intoxicated on the same day and soon afterwards, that he was an habitual drunkard, and had been drinking for several days, warrants the submission to the jury of the question whether he drank any of the liquor provided by defendant.

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2. SAME—DAMAGES—SHAME AND MORTIFICATION.

A request to instruct the jury, that if the defendant had stated in a sworn bill of complaint, filed by her, that her husband had been a drunkard since they were first married, and had committed acts of violence similar to the assault complained of in the declaration, she could not recover damages for mental anguish, loss of companionship, shame, etc., was properly refused, since it excluded her recovery for mental anguish, shame and mortification, growing out of the assault alleged in the pleading, and for the resulting disfigurement to plaintiff.

3. SAME—EXEMPLARY DAMAGES—CHARGE TO JURY.

That the trial court in his charge unduly emphasized the question of exemplary damages was not shown to be prejudicial where the verdict was small, and there was ample evidence warranting exemplary damages.

Error to Kalamazoo; Knappen, J. Submitted July 15, 1910. (Docket No. 164.) Decided November 11, 1910.

Case by Mary Ryerson against Emmet E. Phelps and the Michigan Bonding & Surety Company for the unlawful sale of intoxicating liquors to her husband. Judgment for plaintiff; defendants bring error. Affirmed.

Frost & Farrell and *A. F. Bunting*, for appellants.

Jackson & Fitzgerald, for appellee.

BLAIR, J. Defendant Phelps is the proprietor of a saloon in the city of Kalamazoo. The Michigan Bonding & Surety Company was the surety on his liquor bond from May 1, 1908, to April 30, 1909. Plaintiff has lived in the city of Kalamazoo for several years past. She was divorced from a former husband. Before she obtained this decree, plaintiff knew of Ryerson's drinking habits, as he boarded with her. In August, 1905, she married her present husband, Ryerson. From the time of his marriage to her, Ryerson has been in the habit of getting intoxicated and abusing plaintiff and her son. In 1907, plaintiff began divorce proceedings against Ryerson,

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alleging the excessive use of intoxicating liquors, of profane and indecent language, and physical punishment of the worst kind. At that time, Ryerson was confined in the Detroit house of correction for an assault and battery.

When he returned, he contributed nothing to plaintiff's support, and did not live with her for nearly a year. He returned to plaintiff's home in the latter part of July, 1908. From that time until Thanksgiving, he did not get drunk as often as before, but soon returned to his old ways. During this time, plaintiff occasionally drank beer with her husband. On March 8, 1909, an 18-year old son of plaintiff went to defendant Phelps, at the request of Ryerson, and purchased a half pint of whisky, which was delivered to Ryerson. This was in the forenoon. In the evening, Ryerson came home drunk, and an affray occurred in which he struck plaintiff several times with his fist, tearing "the lower edge of her ear loose and otherwise injuring her." The jury found a verdict for plaintiff for $629.50, and defendants bring the record to this court for review. The errors relied upon for a reversal will be considered in the order of their presentation in defendants' brief.

1. "As the case stood when the motion to direct a verdict for defendant was denied, there was an entire absence of testimony showing that Ryerson drank any of the liquor alleged to have been furnished by defendant Phelps."

The only direct testimony as to Ryerson's drinking any of the liquor sold by Phelps came from plaintiff's son (who delivered the bottle to him at about 11 o'clock in the forenoon), to the effect that he thought Ryerson took a drink at that time, but could not say for sure. Plaintiff testified that, when he came home to dinner a little after noon, he was under the influence of liquor, and the testimony tended to show that he was an habitual drunkard, and had been drinking for several days. Under such circumstances, we do not think the court would have been justified in directing a verdict on this ground.

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2. Defendants' argument in support of this point is as follows:

"The proofs plainly showed that in July, 1907, plaintiff began suit against her husband for divorce, in which suit she charged him with acts of drunkenness and personal violence almost identical with those charged in the present case. These were all admitted to be true by plaintiff. Defendants requested the court to charge the jury as follows:

(9) "'I further instruct you that if you find from the evidence in this case that plaintiff did, on or about the 8d day of July, A. D. 1907, file her sworn bill of complaint in proceedings for a divorce from her husband, Wyley W. Ryerson, charging him with acts of drunkenness and personal violence, such as are complained of in the present case, and therein alleging that said acts had continued ever since their said marriage, then you are not at liberty to allow plaintiff any damages for mental anguish, loss of companionship, or for the shame and mortification attendant upon the transaction.'

"This request, which was denied, ought to have been given the jury. *Johnson* v. *Schultz*, 74 Mich. 75 (41 N. W. 865)."

The court, among other things, instructed the jury as follows:

"I further instruct you that, if you find from the evidence in this case that plaintiff's husband had been in the habit of getting intoxicated ever since the time of his marriage to plaintiff, then you are not at liberty to assess defendant anything for injury to plaintiff's feelings caused by the alleged shame and mortification plaintiff suffered growing out of his intoxication in this case in question. * * * As to the actual damages, you will determine whether or not she was assaulted or injured, and you will give to her, if you find all the other facts as I have stated them to you to have been proven by the evidence, that amount which will compensate her. That is the theory of the law; that is what juries are for, if you come to the question of damages, to compensate one party for something that is due from the other. How much do you think she has suffered by being injured about the face and ear, the pain and suffering, the shock, the damage to property, and suffering that may have been sustained by

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reason of the publication of it, the remarks of people, exclusion from society, and anything of that kind that she has shown, would come under the head of actual damages. * * * I further instruct you that if you find from the evidence that plaintiff did, on or about the 3d day of July, 1907, file her sworn bill of complaint in proceedings for a divorce from her husband, Wyley Ryerson, charging him with acts of drunkenness and personal violence, such as are complained of in the present case, and therein alleging that said acts had continued ever since their said marriage, then you have a right to consider that admission or statement on her part for what it is worth, for the purpose of determining how much mental anguish, shame, and mortification this subsequent act produced upon her mind, if it did any."

The defendants' request excluded from the consideration of the jury as a basis for damages any mental anguish, shame, or mortification growing out of the assault and battery, with its attendant injuries to, and disfigurement of, plaintiff's person, causing remarks by strangers in street cars and other public places and wide notoriety through publication in the public press. The court did not err in refusing to give the request.

3. "In his charge to the jury, the court practically directed a verdict for plaintiff, and in addition made it almost impossible for the jury to render any verdict without including in the same some amount as exemplary damages."

We do not think the charge is subject to the criticism that it practically directed a verdict, and very little stress is laid upon this contention in defendants' brief. The principal complaint under this head is that the court erred in the manner of submitting the question of exemplary damages. As to this, counsel say in their brief:

"Our principal contention is, not that the court has incorrectly stated the law governing the case, but that by recurring to the question of exemplary damages so often, by calling them by that term no less than a dozen times, and by emphasizing that particular part of the case, when as a matter of fact, there was no evidence of any wilful

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intent and no evidence from which any could be legally inferred, except that defendant Phelps knew of the fact that plaintiff was the wife of the person to whom he sold the liquor, the court has unduly impressed and biased the jury by the charge and rendered them unfit to reach a proper conclusion."

In view of the moderate verdict rendered by the jury, and the abundant support in the testimony for a verdict including exemplary damages, it is not apparent how defendants were prejudiced by the charge in this regard. At all events, we do not think that any such undue emphasis was placed upon this subject by the court as to warrant a reversal of the judgment.

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

HANOLD *v.* COMMON COUNCIL OF THE VILLAGE OF STAMBAUGH.

1. INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS—LICENSE—MORAL FITNESS OF LIQUOR DEALER.

   Under Act No. 291, Pub. Acts 1909, it is not within the province of a village council to reject a liquor dealer's application for a license on the ground that he had sold liquor to school children.

2. SAME—PRIORITY—MANDAMUS.

   The writ of mandamus will issue to compel the village council to reconsider an application to conduct a retail liquor business and to vacate its proceedings in approving the application and bond of another liquor dealer, filed after the date of relator's application, which was rejected on the ground of moral unfitness, where the number of saloons is limited to nine by law, and nine applications, including the one to be vacated, have been granted.

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Certiorari to Iron; Flannigan, J. Submitted September 27, 1910. (Calendar No. 24,112.) Writ granted November 11, 1910.

Mandamus by William F. Hanold to compel the common council of the village of Stambaugh to revoke a liquor license and grant relator's application to sell liquor at retail. An order denying the writ is reviewed by relator on writ of certiorari. Reversed, and writ granted.

Cummiskey & Spencer, for relator.

A. J. Waffen, for respondents.

BIRD, C. J. The relator, William F. Hanold, applied to the circuit court for the county of Iron for a writ of mandamus to compel the common council of the village of Stambaugh to grant his application for a liquor license. The circuit judge denied his application, and relator has removed the proceeding to this court for review.

The village of Stambaugh is entitled under the law (Act No. 291, Pub. Acts 1909) to a maximum of nine saloons. Previous to May 16th, the council had granted nine applications for licenses, including one to respondent Stivonski. Stivonski failed to file his approved bond with the county treasurer within the two weeks required by the statute. He filed another application on May 16th. Prior to this, and on April 27th, relator filed his application. At a meeting of the council on May 16th, relator's application was first considered. Objections were made to its allowance on the grounds, *first*, that he had sold liquor to school children; *second*, that he had harbored prostitutes in his place of business. Some testimony was taken before the council tending to prove the first charge. No attempt was made to establish the second one. The relator's application was denied solely on these grounds. Stivonski's application was then taken up and allowed. He at once filed his bond, and is now engaged in the business.

It was the opinion of the trial court that relator's appli-

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cation conformed in all respects to the requirements of the statute; that he was possessed of the qualifications specified in the act; that the action of the council in rejecting the application, for the reasons it did, was unwarranted; and that relator's application for a license should have been granted, but declined to issue the writ on the ground that to compel the council to approve relator's application would result in a violation of the law in respect to the number of saloons in Stambaugh. The rule which the legislature has established to guide in the consideration and approval of applications for licenses is, in part, as follows:

"*Provided, further*, That when an applicant is found to be ineligible under the terms of this act, or when said applicant fails to furnish a proper bond, or when a license is revoked or determined from any cause, such township board or village or city council shall grant further applications, if any are on file, up to such maximum number, giving preference to those filed on or before April fifteenth, and after that to applications in the order in which the same are filed." Act No. 291, Pub. Acts 1909, § 39.

Under this provision of law, it was the duty of the council to give relator's application the preference over respondent Stivonski's, and, if it appeared that there were no legal objections, it should have been granted. The council had no lawful authority to grant Stivonski's application until relator's application was withdrawn or denied upon some legal grounds. It is not important whether the charges preferred against relator were established or not, nor is it important whether he had proper notice of them, as the council was dealing with a question entirely outside of its jurisdiction. The legislature has not vested the council with the power and discretion to prefer one applicant to another on account of his moral fitness. See *Robison* v. *Miner*, 68 Mich. 555 (37 N. W. 21). The duty which the legislature has placed upon the council is to determine whether the applicant has brought himself within the terms and conditions imposed by the

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statute. If the applicant has done this, his application should be granted, whatever the view of the council may be as to his moral fitness. The council makes it clear, in its answer to the order to show cause, that it rejected relator's application on account of the charges and for no other reason. Inasmuch as these charges do not constitute legal grounds for its rejection, we think the relator is clearly entitled to the relief prayed for in this action (*Amperse* v. *City of Kalamazoo*, 59 Mich. 78 [26 N. W. 222, 409]), and that he ought not to be deprived of it, because the council has, without authority of law, granted the right to another.

The writ will be granted, directed to the village council of Stambaugh to vacate its proceedings approving the respondent Stivonski's application and bond, and to reconsider relator's application, and, if found without legal objections, to approve it.

No costs will be allowed against the council, as the trustees undoubtedly acted in good faith in denying relator's application.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

DETROIT LUMBER CO. *v.* AUXILIARY YACHT "PETREL."

1. APPEAL AND ERROR—WATERCRAFT PROCEEDINGS—ADDITIONAL TESTIMONY ON APPEAL—WAIVER OF OBJECTIONS.

In proceedings to enforce a demand against a watercraft, failure of the appellant to give notice of its intention to take additional testimony within 10 days after the filing of the return in the Supreme Court, is waived by the participation

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of the appellee in taking the testimony, notwithstanding appellant's neglect to comply, by giving the notice, with Supreme Court Rule 57.[1]

2. SAME—PRINTING RECORD—MOTION TO DISMISS.
After additional testimony was taken on appeal, the attorney for appellant caused the depositions to be delivered to himself, and without objection of the appellee proceeded to settle a bill of exceptions for the purpose of decreasing the cost of printing, but on failing to agree upon any reduction in the size of the record, submitted the same to the printer, and proceeded with diligence to bring on the cause for hearing. *Held* that in consideration of the appellant's diligence, the unsettled nature of the practice, and the participation of appellee's attorney in the proposed settlement of a bill of exceptions, the motion to dismiss should be denied.

3. SAME—PRACTICE—DEPOSITIONS.
After taking depositions for use in the Supreme Court, it was the duty of the commissioner to transmit them to the court, not to deliver them to the attorney for appellant.

Proceedings by the Detroit Lumber Company to collect a demand against the auxiliary yacht "Petrel." From a judgment for defendant, complainant appeals: On motion to dismiss. Submitted September 28, 1910. (Calendar No. 23,321.) Motion denied November 11, 1910.

Trevor & Bumps, for the motion.

E. T. Berger, contra.

BLAIR, J. This matter has been before this court on three previous occasions. See 153 Mich. 528 (117 N. W. 80); 155 Mich. 350 (119 N. W. 1072, 120 N. W. 749); 156 Mich. 565 (121 N. W. 274). On May 25, 1909, at the time of denying the motion before the court in 156 Mich. 565 (121 N. W. 274), this court adopted Rule 57. See 155 Mich. xxxi (120 N. W. v). On June 8, 1909, and again on August 10, 1909, complainant served upon defendant notice of taking depositions. On the 16th day of August depositions of witnesses on behalf of complainant were taken

[1] Adopted May 25, 1909; 155 Mich. xxxi.

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before a circuit court commissioner, and on September 2d depositions of witnesses in behalf of defendant were taken before said commissioner. These depositions have never been returned to this court. Complainant's sworn answer of August 11, 1910, to the motion to dismiss the appeal filed August 10, 1910, shows as follows:

"That complainant duly directed the court stenographer to have said depositions transcribed and reduced to writing, which was done, but complainant did not actually receive such transcribed copies until October 12, 1909. The bill of exceptions was then prepared, and a copy of same served on the attorney for the defendant November 2, 1909, and it was not until some time in November or December that a long list of amendments to said bill of exceptions was received by the complainant. Subsequent to receiving such amendments, complainant's attorney sought defendant's attorney on at least two occasions to reduce the size of the record by elimination of some of the testimony, which complainant considered immaterial, and it was only a matter of a few months since it was learned that said negotiations would be futile. Complainant has now submitted the entire record to the printer in an effort to bring the matter on before the Supreme Court at the September term thereof."

Counsel for defendant argues that the appeal should be dismissed for the reasons:

(1) Because the complainant did not comply with Rule 57 in giving notice of its desire to take additional testimony within 10 days after the filing of the return, etc. Inasmuch as defendant participated in the taking of the depositions and also took depositions, such objection is not tenable, having been waived.

(2) The record has not been printed and served within the time prescribed by said Rule 57.

We agree with the contention of defendant that section 10139, 3 Comp. Laws, applies to such proceedings. Section 10834, 3 Comp. Laws, provides that:

"The proceedings and practice under this act shall be the same as in personal actions at law except as herein otherwise provided, so far as the same may be applicable

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and the depositions of witnesses may be taken, for the same causes, in the same manner, and with the like effect as in personal actions," etc.

Section 10826, 3 Comp. Laws, provides:

"The causes shall be considered as in the Supreme Court from the perfecting of the appeal; and at any time within sixty days thereafter, unless the time shall be extended by order of any justice of the court, either party may take testimony, by deposition or commission, in the mode now provided by law in any case, without regard to the place of residence of the witness."

It was not the intention of this court to abrogate these provisions of the statute, but merely to establish the practice where the statutes were silent. Under section 10139, 3 Comp. Laws, it was the duty of the commissioner taking the depositions to transmit them, when completed, to this court.

Complainant's attorney appears to have procured the delivery of the depositions to himself and, from the time of such delivery, at least, was responsible for their not being filed with this court.

The attorney for defendant, however, appears to have made no objection to this course, but to have encouraged it by participating in the proceedings for settling a bill of exceptions, for which reason, in view of the statements in the sworn answer as to present diligence and the fact that the practice has not been heretofore settled, we have concluded to dismiss the motion, but with the usual costs to defendant.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

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GOODFELLOW TIRE CO. v. COMMISSIONER OF PARKS AND BOULEVARDS OF THE CITY OF DETROIT.

1. HIGHWAYS AND STREETS—MUNICIPAL CORPORATIONS—RIGHT OF ACCESS.
   The owner of property abutting on a street has ordinarily a right of ingress and egress to and from his property.

2. SAME—STATUTES—DETROIT CHARTER—MANDAMUS.
   The commissioner of parks and boulevards of the city of Detroit may not deny the application of an abutting property owner to construct a driveway for access from his property to the Grand Boulevard, but should grant a permit therefor, subject to reasonable regulations and requirements, under Act No. 374, Local Acts 1879, and the amendments thereto.

Certiorari to Wayne; Donovan, J. Submitted October 4, 1910. (Calendar No. 24,099.) Decided November 11, 1910.

Mandamus by Goodfellow Tire Company against Myrtle P. Hurlbut, commissioner of parks and boulevards of the city of Detroit, to compel him to issue a permit to relator to construct a driveway from Grand Boulevard east, to relator's factory. An order denying the petition is reviewed by relator on writ of certiorari. Writ granted.

May & Dingeman, for relator.

P. J. M. Hally, for respondent.

MOORE, J. The relator is a Michigan corporation, whose principal business is that of filling automobile tires with a composition claimed to render them puncture proof. It also sells and handles automobile accessories. It is the owner of the north 95 feet of the easterly 100 feet of lots 2 and 3 and the southerly 5 feet of lot 1 of Frisbee & Foxen's subdivision of part of fractional section 31. These lots are at the corner of the boulevard and Woodward

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avenue in the city of Detroit. Lots 1, 2, and 3 front upon Woodward avenue. On the front 100 feet of the lots a block of stores, three stories high, is erected; at the rear of said stores, and between them and the alley, the relator is erecting a two-story building for the purpose of carrying on its business. Its property fronts on the boulevard. It applied to the respondent for a permit to give access to its building to and from the boulevard by means of two driveways. The commissioner having denied the application for permission to construct the driveways, a petition for a writ of mandamus was filed in the court below, and, on denial of this petition, the cause was brought to this court by certiorari.

The claim of the respondent is stated by his counsel as follows (we quote from the brief):

"The respondent further says in his answer that under the statute relating to said office of commissioner of parks and boulevards of said city of Detroit, and to the parks and boulevards of said city, he submits he has the sole charge and management and control of said parks and boulevards and of the improvements and maintenance thereof, and he avers it was and is within his exclusive judgment and discretion, as to whether a permit should be issued for the construction of said driveway, and, in the exercise of such judgment and discretion, he refused to issue a permit therefor. This respondent respectfully submits that this court has no jurisdiction to control the exercise of the discretion of this respondent to command him as against his judgment in the premises to issue permits for the construction of driveways on said boulevard or determine when, how, or where said driveways shall be made, and he makes this submission as in the nature of a demurrer to said petition."

One of the counsel for respondent says in his brief that:

"Almost this identical question here contended for was presented to this court in a case which is entitled *Abrey* v. *Livingstone*, 95 Mich. 181 (54 N. W. 714). The jurisdiction of the commissioner in that case and in this is similar, and the act there construed is the act here under consideration. Abrey desired to have ingress and egress from the land under the control of the park commissioners

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to his land which abutted upon its holdings, and his right for that purpose was denied."

An examination of that case will show that the act which was construed was not the one before us now, but was Act No. 391, Local Acts 1879. In disposing of the case, Justice LONG, speaking for the court, said, in part, as follows:

"The complainants filed their bill in the Wayne circuit court in chancery, setting up that they are the owners of the lands adjacent to these strips, and have a frontage thereon. They procured their titles to these lands after Kanter and wife deeded the approach to the bridge to the city, and now claim that such approach is in its entire width a public street, through which they have the right of ingress and egress from their lands. It is claimed by the defendants that it is their intention to ornament these strips outside of the walks, and, to prevent encroachments thereon, to erect necessary fences or walls along the outer sides of the same. The complainants seek by their bill to enjoin the defendants from erecting and maintaining these fences or walls. Defendants claim that these pieces of land are not a part of the public highway, but that the city may devote them for the purposes of a park, and shut off the approaches from either side. Complainants' bill was dismissed in the court below, and they appeal. It is contended by counsel for complainants that these parcels of land have always been regarded throughout their entire width by the common council and the board of public works as a street; that the strip of land from Jefferson avenue to the river was purchased for the purpose, and no other, of an approach to the bridge and a continuation or extension of the boulevard to the bridge. This piece of land was purchased by the city under the power granted by the above-named act."

The court held, in that case, with the defendant, that the land had never been a highway and sustained the contention of the city. The boulevard was called into existence by virtue of Act No. 374, Local Acts 1879. When the boulevard was established, much of it, including the land now belonging to the relator, was in the country outside of the city limits. Section 10 of the act gave to the commissioners the following powers:

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"To adopt plans, for constructing, laying out, improving, ornamenting and beautifying the said boulevard, and shall have a supervisory and superintending control of the execution of such plans. They shall also have a like control and management of the maintenance and care of the said boulevard, and shall have power to make all reasonable rules and regulations concerning the use of said boulevard, and for the protection of the same."

Section 14 of the act reads:

"Whenever the said boulevard, or any part thereof, shall be opened, either by grant or conveyance, or by proceedings *in invitum*, the same shall, under such reasonable rules and regulations as shall be adopted by the said board of boulevard commissioners, be common and public, for the uses and purposes of such boulevard."

After the city limits were extended so as to take in the boulevard, legislation was had to meet the new conditions. The respondent is the successor of the previous commissioners. The act of 1879 was amended May 24, 1895, and May 4, 1901. By the act of 1895 (Act No. 436, Local Acts 1895), numerous detailed provisions were added further regulating or empowering the commissioners to regulate the use of the parks and boulevards. For example, prohibiting the bringing or the driving of animals, excepting horses, in the parks and boulevards; limiting the rate of speed, restraining the use of footpaths, grass plats, and other portions thereof, excepting upon carriage drives, by vehicles; preventing the obstruction of roadways, the injuring of property, the destruction of or interference with plants, trees, grass, etc. Heavy traffic was forbidden excepting where there was no alley in rear, and then only to the nearest cross street. Funeral and other processions were prohibited, as was also the playing of games and the speeding of horses, excepting at places designated by the commissioner. The act of 1901 (Act No. 417, Local Acts 1901) provided for a single commissioner of parks and boulevards in place of the board of commissioners and re-enacted many of the sections of the act of 1895, substituting "commissioner" in place of "commission-

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ers" or "board." In its present form both of these acts contained the following (section 39, Act No. 436, Local Acts 1895; section 39, Act No. 417, Local Acts 1901):

"No person shall dig, remove or carry away any sward, sand, turf or earth in or from any public park or boulevard, and no person shall open or dig up or tunnel under any part or portion of the boulevard without a permit from the commissioner of parks and boulevards, and before granting any such permit the applicant therefor shall be required to deposit with the secretary of said commissioner such sum of money as the superintendent of the boulevard, or such other officer as the commissioner may designate for that purpose, shall estimate will fully cover any expense to be incurred by the commissioner in connection with such opening or tunneling, and the commissioner may make suitable regulations and conditions with respect to issuing said permits. And said commissioner may retain the actual expense, which shall be certified by the superintendent, which may be incurred by the commissioner in connection with any work done by him, for the purpose of restoring any roadways, sidewalks, planting place or other portion of said boulevard, and the secretary shall refund to the person to whom said permit shall be issued the difference, if any, between the amount deposited and the amount so certified by the superintendent. Carriage or drive ways and foot walks connecting with any premises adjoining the boulevard, or hitching posts thereon, shall be allowed only on a permit issued under this section, and the material used in making such ways, walks or posts, shall be determined by the said commissioner."

It is claimed under existing conditions the commissioner may deny relator the right to construct any driveway from his premises to the boulevard.

At volume 28 of Cyc. p. 856, it is said:

"An abutting owner has two distinct kinds of rights in the street—the public one, which he enjoys in common with all citizens, and private rights which arise from his ownership of contiguous property. Among the private rights are the right of free and unimpeded ingress and egress to and from his property for himself and animals and goods * * * and the right to have the street kept open and continued as a public street for the benefit of his contiguous property."

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In the same volume, at page 863, it is said:

"Abutting owners have an indefeasible right of access to and from their property to the street."

In the notes many cases are cited which sustain the text.

Counsel for respondent cite *McCormick* v. *Park Commissioners*, 150 Ill. 516 (37 N. E. 1075); but that case is not conclusive in favor of the respondent. Indeed, it is said in the opinion:

"Undoubtedly the owners of lots bordering upon streets or ways have the right to make all proper and reasonable use of such part of the street for the convenience of their lots, not inconsistent with the paramount right of the public to the use of the street in all its parts. *Smith* v. *McDowell*, 148 Ill. 51 (35 N. E. 141, 22 L. R. A. 393), and cases cited. In the absence of legislative direction or municipal declaration of what such rights shall be, what is to be deemed a reasonable and proper use will depend, in a large degree, upon the public usage in like instances, and upon the local situation. General use by lot owners, and acquiescence therein by the public and public authorities, may always be resorted to as evidence of what is a reasonable and proper use and of the existence of the right. 2 Dillon on Municipal Corporations, §§ 521, 553, 585, 794; *Van O'Linda* v. *Lothrop*, 21 Pick. (Mass.) 292 (32 Am. Dec. 261); *Com.* v. *Blaisdell*, 107 Mass. 234; *Nelson* v. *Godfrey*, 12 Ill. 22."

Scovel v. *City of Detroit*, 146 Mich. 93 (109 N. W. 20), is also cited. In the opinion in that case occurs the following:

"In 2 Dillon on Municipal Corporations (4th Ed.), § 656, it is said:

"'Public streets, squares, and commons, unless there be some special restriction, when the same are dedicated or acquired, are for the public use, and the use is none the less for the public at large, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control and regulation of them to the local authorities. The legislature of the State represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent ju-

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dicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places.'"

Our attention has not been called to a case holding that an abutting owner might be deprived of ingress and egress by means of a driveway to and from his property to the highway in front of it. Certainly, when the legislature, in 1879, gave to the commissioners authority "to make all reasonable rules and regulations concerning the use of said boulevard," no one supposed they might deny the right of the abutting owner to construct a driveway to the boulevard. The provision in section 39, reading:

"Carriage or drive ways and footwalks connecting with any premises adjoining the boulevard, or hitching posts thereon, shall be allowed only on a permit issued under this section, and the material used in making such ways, walks or posts, shall be determined by the said commissioner"

—does not contemplate that the permit shall be denied, but the inference is a fair one that it shall be allowed upon suitable regulations and conditions.

The commissioner, instead of refusing the permit, should have granted it subject to reasonable regulations and conditions as to number, location, plan of construction, and material used therein, and it will be so ordered.

BIRD, C. J., and OSTRANDER, HOOKER, and MCALVAY, JJ., concurred.

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LANG *v.* PRINDLE.

1. PARTIES—HUSBAND AND WIFE—ESTATES BY ENTIRETIES—FRAUD AND DECEIT.

   The wife who executed jointly with her husband a land contract for the purchase of a fruit farm and who caused to be conveyed in part payment for the premises a parcel which appeared of record to belong to a third party, an attorney of the husband, but to which land the wife had previously had title and in which the plaintiff claimed an equity, is a necessary party to an action for fraud of the vendor in making the sale, where only a small part of the agreed price had been paid, and plaintiff did not attempt to rescind his bargain.

2. HUSBAND AND WIFE—TENANCY BY ENTIRETIES.

   In real property held by husband and wife by the entireties, neither has an undivided interest, but the estate is an entirety which is not defeated or affected by the act or conveyance of either.

Error to Van Buren; Des Voignes, J. Submitted October 5, 1910. (Docket No. 4.) Decided November 11, 1910.

Case by George S. Lang against Eugene F. Prindle for fraud. Judgment for plaintiff; defendant brings error. Reversed.

Anderson & Warner and *William J. Barnard*, for appellant.

Thomas J. Cavanaugh and *L. A. Tabor*, for appellee.

MOORE, J. This suit was commenced by summons in July, 1908. The plaintiff recovered a judgment for $6,500, which it is sought to review by writ of error.

Negotiations were had between the parties to this litigation running through several months for the exchange and purchase of real estate. A land contract was finally made in which the following appears:

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"Article of agreement, made and concluded this 25th day of September in the year 1905, between Eugene F. Prindle and Emma A. Prindle, his wife, parties of the first part, and George S. Lang and Amelia Lang, as husband and wife jointly, parties of the second part, witnesseth: That the said parties of the first part, or their heirs, executors and administrators, at the request of the said parties of the second part, and in consideration of the money to be paid, and the covenants, as herein expressed, to be performed by the said parties of the second part, hereby agree to sell and convey to the said parties of the second part, all the following described land, situated in the township of Antwerp, county of Van Buren, State of Michigan, to wit."

Then follows a description of the land:

"The sum of $2,500 mentioned below is paid by a deed of certain lands on section 29 of Antwerp township aforesaid deeded by Walrath and wife to Eugene F. Prindle as a part of this transaction, said deed being subject to a mortgage of $1,500 assumed by said Prindle. And it is expressly agreed that if said Prindle is required to pay any more than $1,500 and interest thereon from October, 1905, to settle said mortgage, then said excess and all extra costs and expenses arising on account thereof shall be added to the purchase price of the land described in this contract and repaid to first parties hereto according to the terms of this contract, with the privileges and appurtenances thereunto belonging. And the said parties of the second part, for their heirs, executors, administrators and assigns, in consideration of the premises, hereby agree to purchase said land, and to pay as purchase money therefor to the said parties of the first part, their executors, administrators or assigns, the sum of twelve thousand dollars as follows, viz., $2,500 on the execution and delivery of this agreement. For the payment of the balance ($9,500) second parties agree to deliver all grapes grown on said premises to the Southern Michigan Fruit Association at Lawton, Michigan (or to such other parties as the parties hereto may agree upon). From the proceeds of said grapes second parties shall receive the price of all baskets and packages used in marketing said grapes. Of the balance second party shall receive one-third, and first parties two-thirds each year as payment of principal and

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interest until all shall be paid in full. Each party shall collect his own share from said association. This contract shall be fully paid on or before twenty years from date, with interest at the rate of six per cent. per annum, to be paid annually on the whole sum from time to time remaining unpaid. And, also, that said parties of the second part will well and faithfully, in due season, pay or cause to be paid, all taxes and assessments, ordinary and extraordinary, for any purpose whatever, that shall be taxed or assessed upon the said land and appurtenances, including the year 1905. * * * It is further agreed that second parties have the option of paying fifty dollars or more on this contract at any time in addition to the amount arising from the grape crop above set forth. * * *

"In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

"Signed, sealed and delivered in presence of:

"LOWELL A. PARKER,

"VERNE M. PALMER,

"EUGENE F. PRINDLE. [Seal.]

"EMMA A. PRINDLE. [Seal.]

"GEORGE S. LANG. [Seal.]

"AMELIA LANG. [Seal.]"

Then follows the acknowledgment. On the back of this contract appear the following indorsements:

1906, Dec. 4th, As interest	$570 00
1906, Dec 4th, On principal	80 94
1907, Jan. 10, Rebate of 1906	88 50
1908, Feb. 10, On interest of 1907	266 54

The deed from Mr. Walrath and wife was made as provided in said contract. The record shows that the land mentioned in said deed was conveyed to Mr. Walrath by Mrs. Lang, and that the record title was never in Mr. Lang. Mr. Lang and his wife entered into the possession of the farm and have been in possession ever since. It does not appear that any payments have been made upon the contract except those before mentioned.

The following averments are contained in the declaration filed in the case:

"For that, whereas, heretofore, to wit, on the 25th day

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of September, A. D. 1905, in the county of Van Buren, the said plaintiff, at the special instance and request of the said defendant, bargained with the said defendant to buy of the said defendant a certain tract of land situate, * * * and then entered into a land contract with the said defendant for the said purchase of said lands at and for a certain price, to wit, the sum of $12,000, $2,500 of which was paid down by means of a trade and the balance evidenced by said contract, and the said defendant by then and there falsely, deceitfully, and wrongfully and fraudulently, representing the said farm, * * * with intent to defraud, deceive, injure, and damage the said plaintiff and with knowledge of the falsity of said representations so made to the said plaintiff, then and there sold said farm to said plaintiff and procured from the said plaintiff his signature to said contract and procured and induced the said plaintiff to become obligated to him, the said defendant, in terms, conditions, and stipulations set forth in said contract, and caused the said plaintiff to procure the signature of his wife to said contract, all relying upon said false, deceitful, and fraudulent representations so made by the said defendant, and believing such representations and acting upon said false, deceitful, and fraudulent representations in bargaining for said lands and in signing said contract and in parting with his said land in exchange for the lands of the said defendant and in obligating himself as per the terms and conditions of said contract, whereas, in truth and in fact * * * falsely, fraudulently, and wrongfully deceived and misled the said plaintiff into signing said contract, into turning over to him, the said defendant, the equality of $2,500 in cash and in obligating himself to the said defendant to pay the balance of the agreed purchase price of said farm, to wit, $9,500. * * * Again, all of which statements and representations were false and untrue, he on or about the 25th day of September, 1905, at the special instance and request of the said defendant, duly purchased said farm of and from said defendant at and for the said value of $12,000 and duly paid therefor $2,500 in other property, which was duly accepted by said defendant as payment thereon and duly covenanted and agreed to pay said defendant the balance of said $12,000 then amounting to $9,500, and having so purchased the same went into possession thereof, and during the seasons of 1906 and 1907 tilled and worked the same in a good

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farmer-like manner, but during both of said seasons, because of the grape vines having been diseased and unproductive, the fruit thereon was not fit for the market or for consumption and became worthless, and the income therefrom was not of the value of the labor and expense of tilling and working the same, whereby and because of which the said plaintiff, for said two years of 1906 and 1907, received and obtained from said farm no income whatever and not sufficient to pay him for the labor and expense laid out in cultivating and working the same, whereby and because of which said misrepresentations and false and fraudulent inducements so held out knowingly and intentionally by said defendant to said plaintiff as an inducement to said plaintiff to cause him to so purchase said farm at and for said sum of $12,000, and because of said plaintiff having been so misled and fraudulently deceived by said defendant's publication and statement, by relying thereon, and so purchasing said farm, he has suffered great loss and damage in a large sum of money, to wit, in the sum of $10,000, wherefore he brings suit," etc.

The contract between the parties is dated September 25, 1905. This suit was brought in the fall of 1908. The points relied on for reversal are:

"(1) Errors in admitting testimony as to matters not material and tending merely to prejudice the defendant before the jury.

"(2) Errors in admitting testimony as to representations not set forth in the declaration.

"(3) In permitting testimony in contradiction of the record tending to show that Amelia Lang was not the owner of the Claus place, and that she made no claim that defendant had committed any fraud upon her individually; and in permitting the introduction of the contract, in evidence, and in overruling defendant's claims as to the fact of plaintiff and his wife being owners of the land involved by entireties, and in refusing defendant's request to charge in that particular as to the plaintiff's right to recover under the contract.

"(4) Error in the measure of damages as submitted in the charge of the court.

"(5) Error in denying defendant's motion for new trial on the ground that the verdict was excessive."

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In our view of the case it will be necessary to consider only the third of these groups. It already appears that the written contract is made by Mr. and Mrs. Prindle as parties of one part, and by Mr. and Mrs. Lang as parties of the other part. It may be well to quote here some of the testimony of Mrs. Lang. She testified, in part, as follows:

"He (Prindle) talked to my husband at our home about the farm we now own, yes. Said that it was a good farm, was the best in the neighborhood all around Lawton; that they had started on a very low ebb, and they had worked very hard, so hard that he had injured his health; but now he had got his farm, so that they were fixed comfortably for life, in fact, he had made a big income. Yes, I am sure it was $4,000. He said he would like us to buy the farm; that we would be very satisfied, have a good home, have plenty to do with, if we went there, and we would be comfortable for life. The neighborhood was nice and the people of Lawton—well, we were in a nice neighborhood, and he was sure we would be satisfied if we made up our minds to purchase it from him. * * * In fact, he represented to us that, if we took the farm, it was so useful a farm we could get everything we wanted to live on there; that it would produce everything that we wanted to keep the farm going. He just spoke of his farm and the advantages of it, and how it was situated and just generally speaking of the farm as any one would tell, describe a property to some one else that didn't know anything about it. I don't remember seeing any booklet at that time. He said that some people were unfortunate enough to have their grapes situated so that they were right in the frost line; that some of them would year after year be frozen up and all the prospect of a crop would be destroyed. * * * I remember of the paper writing coming to my home at one time; yes, sir. I couldn't say whether Mr. Prindle handed it to my husband downtown, or whether he sent it by mail. We had it there in the house; yes, sir. After that Mr. Prindle came there several times. The first time he came after we had this contract, he stayed over night. He came several times and stayed. He always made our house his place that he used to come and stay when he was in the city, and spent the night with us. * * * He came

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and stayed with us the night before he went to Texas, and he came and slept the night after he came from Texas, and the next morning as he was getting ready to return to Lawton he said: 'Mrs. Lang, I am not going to be in a hurry to get rid of my farm. I can make $4,000 income on my farm, and I cannot do that on any farm that I have seen. Mine is a mighty good farm, and I am not going to get rid of it in a hurry.' I said: 'Mr. Prindle, I wonder that you want to get rid of such a farm, if it is as good as you say.' He says: 'Mrs. Lang, I don't, except it was on account of my poor health. I thought when we had that house built that we never would leave that house for good unless I was carried out'—meaning unless he died and would have to be carried away. He said he thought Mr. Lang was pretty slow in coming and settling up affairs, and I replied: 'Mr. Lang will settle things just as soon as he possibly can, but this matter of the insurance on the Claus farm has to be cleared up before things can be settled properly, but just as soon as ever we can settle and arrange things satisfactorily to every one, we will do it. * * * I came down to Lawton with my husband to look at the farm. We put up at the Hotel Giddings the night, and the next morning Mr. Prindle came down with a surrey, and he took us to the Claus farm that we then owned—it was ours. We looked over the farm. Then he took us up to his farm, and showed us his grapes, and all of it, and went through the house, and I remember one instance, sir. There was a lovely crop of grapes there, and there were grapes loose on the ground, and my husband said to him: 'What are those grapes on the ground?' And he says: 'Why, the vines are so heavily laden with grapes that they can't carry all the grapes, and those you see on the ground are those that have dropped off simply because the vine cannot nurture them.' Those grapes on the ground were dried and shriveled. They were black. They had not dropped off to any great extent. The bunches were full. It was a lovely show of grapes there. My husband, Mr. Prindle, and I were alone. * * * When we went into the house, there were peaches in grape baskets placed along the kitchen, and Young's wife mentioned to Mr. Prindle would he take his share; that was all they had that year, and I believe there was about 18 baskets, because I remember that Mr. Prindle's share we packed into the surrey and took home to Mrs. Prindle. Mr. Prindle said that year the peach

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crop had been a failure. He didn't say anything with reference to the condition of the peach trees. * * * In September when we were there looking at the farm, after we looked at the farm, we returned to Lawton for dinner. We were staying at Prindle's home. We came to Paw Paw that same day in the evening. We stayed in Paw Paw about three-quarters of an hour. We got back to Lawton just before supper time. The question came up again about this farm, and he was getting anxious about it. Of course we were saving all we had, all the available money we had, to put in the farm. We told Mr. Prindle that. I said: 'Mr. Prindle, are you sure that one-third of the grape crop will be sufficient to pay all the running expenses of this farm?' And he said: 'Mrs. Lang, you will have plenty to do with.' Then I says: 'I have got another question to ask you. Supposing that such a thing should happen that two-thirds of the crop there wouldn't be sufficient to pay the interest on this place, what then?' 'Then, Mrs. Lang, he says, 'I couldn't get my money. I would have to wait for it any time to the end of the 20 years, until all should be paid.' Before that he had talked over the arrangement and the bargain upon which he was going to let us have the land; yes, sir."

It is true that she testified that the Claus farm was her husband's and that she made no claim against defendant for damages; but it is impossible to read the record without reaching the conclusion that Mrs. Lang was as much interested in the transaction as was her husband. The doctrine of tenancy by the entireties is discussed at length in the cases of *Dickey* v. *Converse*, 117 Mich. 449 (76 N. W. 80, 72 Am. St. Rep. 568), and *Fowles* v. *Hayden*, 130 Mich. 47 (89 N. W. 571). In these cases many authorities are cited. We content ourselves with the following quotation from *Fowles* v. *Hayden, supra:*

"In *Speier* v. *Opfer*, 73 Mich. 35 (40 N. W. 909, 2 L. R. A. 345, 16 Am. St. Rep. 556), it is said:

"'In this case the property to be improved and benefited was held by husband and wife jointly, and not as the separate property of the wife. Only at the death of the husband could the wife claim it as her separate property. During the lives of both, neither has an absolute inheritable interest; neither can be said to hold an undivided half. They take by entireties, and at the

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death of the wife the whole passes at once to the husband. *Manwaring* v. *Powell*, 40 Mich. 371; *Allen* v. *Allen*, 47 Mich. 74 (10 N. W. 113); *Ætna Ins. Co.* v. *Resh*, 40 Mich. 241. Neither has such a separate interest that he or she could sell, incumber, or devise, or which his or her heir could inherit. *Vinton* v. *Beamer*, 55 Mich. 559 (22 N. W. 40); *Fisher* v. *Provin*, 25 Mich. 347. It is an entirety, in which both take the same and inseparable interest. Neither can affect the other's rights by a separate transfer, and whatever will defeat the interest of one will defeat the other's. *Vinton* v. *Beamer*, *supra*.'

"In *Dickey* v. *Converse*, 117 Mich. 449 (76 N. W. 80, 72 Am. St. Rep. 568), there is a citation and review of the many authorities, making it unnecessary to call attention to them here. In that case it is said:

"'This species of tenancy grows out of the unity of husband and wife, and is unlike that of joint tenants, who are each seised of an undivided moiety. The husband and wife are each seised of the whole, and not of undivided moieties. *Hardenbergh* v. *Hardenbergh*, 18 Am. Dec. 378 (10 N. J. Law, 42), note.'

"It was held this rule applied to the crops growing upon the land, as well as the land itself."

It will be observed that the declaration does not allege, and the proofs do not disclose, that plaintiff parted with anything because of the alleged fraud and deceit except the $2,500 farm which was traded, the record title to which was never in him. The averment is that because of the fraud and deceit the plaintiff entered into the contract and persuaded his wife to sign the same. Mrs. Lang is just as much bound by the terms of this contract as is Mr. Lang. It is difficult to see how the wife can be disassociated from the contract which is the basis of the transaction. The situation as disclosed by the record shows that almost nothing has been paid upon the contract except the deed of the $2,500 farm, the record title to which was in the wife. Plaintiff and his wife both signed the contract. Instead of rescinding the contract and surrendering the farm, they retain the same and have had the use of it all these years. Cooley on Torts, p. 8, note; *Larsen* v. *Groeschel*, 98 Ind. 160; *Hallett* v. *Gordon*, 122 Mich. 567 (81 N. W. 556, 82 N. W. 827).

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In the meantime the plaintiff has recovered a judgment against defendant of $6,500 for damages. To state the case is to show its injustice. Whatever interest was obtained by reason of the contract was shared by the wife as much as by the husband. We think the wife was a necessary party to the suit.

Judgment is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MCALVAY, and STONE, JJ., concurred.

PASTORINO v. PALMER.

REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE.

Under conflicting testimony, in a suit to reform a lease and to correct a mutual mistake, the opinion and decree of the lower court that the evidence failed to disclose a mutual mistake with such a degree of certainty as to justify reformation, is sustained.

Appeal from Wayne; Hosmer, J. Submitted October 6, 1910. (Docket No. 10.) Decided November 11, 1910.

Bill by Domenico Pastorino and Louis Schiappacasse against Thomas W. Palmer and Friend Palmer for the reformation of a lease. From a decree dismissing the bill, complainants appeal. Affirmed.

Bowen, Douglas & Eaman, for appellants.

Chamberlain, May, Denby & Webster, for appellees.

MOORE, J. In May, 1897, the complainant Pastorino

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entered into a written lease with Friend Palmer for the store known as No. 82 Woodward avenue, to be occupied as a fruit store. The lease was drawn by Otis Scott, the agent of Friend Palmer. The other complainant became surety for the payment of the rent. Mr. Pastorino took possession of the premises, and paid the rent from month to month until July, 1898. After that date, he failed to pay his rent, and a notice to quit was served upon him October 10, 1898. Some time after that he vacated the premises. In June, 1899, Friend Palmer sold his interest in the lease and his claim against the surety to Thomas W. Palmer, who, in September, 1901, commenced suit to recover for the unpaid rent. The bill of complaint was filed in this cause in February, 1902. For some reason the case was not pressed to hearing, and from a decree made in June, 1909, the case is brought here by appeal.

The substance of the bill of complaint is that, when the lease was drawn, it was orally agreed that no competing business should be allowed in the block where the store was situated, that this agreement was to be put in the lease, that it was violated, and it is claimed that complainants were injured and should not be requred to pay the rent.

Among other things prayed is the following:

"(*a*) That the lease or contract may be opened, and that the court cause to be inserted therein, as one of the conditions thereof, the condition or agreement between said Pastorino and said Friend Palmer or his agent, as in this bill set forth, viz., that the said party of the first part, the defendant Friend Palmer and the said Thomas W. Palmer, as assignee of said lease, should rent to no one else any store, stores, or parts of said Merrill block or building for the purpose of carrying on a business such as your orators represented themselves as desirous of carrying on, viz., the retail sale of fruits, soda water, nuts, candy, cigars, etc.

"(*b*) That this court will cause the contract, marked 'Exhibit A,' attached to this bill of complaint, to be opened, and will insert therein a paragraph showing the scope of the business which it was understood your ora-

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tor Pastorino desired to carry on relative to the variety of stock intended to be carried as it shall be proven to have been understood between the parties, and that no other party should be allowed to carry on any similar business on the above described premises during the occupancy of said premises by complainant Pastorino."

It was prayed that the surety might be released. There was also general prayer for relief. In discussing the bill of complaint, the circuit judge, who saw and heard the witnesses, expressed himself in part as follows:

"Now I have listened to the testimony of Mr. Schiappacasse as it was originally given, and the testimony of the complainant in this case, Mr. Pastorino, and I have had the testimony read to me on the hearing yesterday. I am perfectly willing to believe that Mr. Schiappacasse and Mr. Pastorino expected at the time of the lease that there should be no competition by reason of letting any other premises in the Merrill Block for a similar purpose, but I am not satisfied from the testimony which has been adduced in this case that there was that mutual mistake which the law can rectify. It was to be leased for a fruit store according to the terms of the lease, and I am not satisfied from the testimony which is here offered that it was understood by Mr. Scott exactly what was comprehended by the term fruit store, or exactly what was expected, that the parties there should carry on, and I am not satisfied that the evidence which has been presented in this case is so clear or so convincing that it affords an opportunity for a court of equity to decree a reformation of the lease."

He then spoke of what had been done, and what had not been done, and found there had been laches on the part of complainants. There is a sharp conflict in the testimony. The language of the lease is not uncertain. Mr. Scott, who apparently has no interest in the controversy, swears positively that the written lease contains all of the agreement between the parties. Friend Palmer died before the case was heard. The conduct of the complainant Pastorino is not consistent with the complainants' present claim. It would profit no one to reproduce here in detail the testimony. It does not disclose fraud upon

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the part of anybody. We agree with the trial judge that it fails to disclose a mutual mistake with any such degree of certainty as would justify a court in changing the written contract entered into by the parties. See section 859, Pomeroy's Equity Jurisprudence; *Shepard* v. *Shepard*, 36 Mich. 173; *Burns* v. *Caskey*, 100 Mich. 94 (58 N. W. 642); *Kinyon* v. *Cunningham*, 146 Mich. 430 (109 N. W. 675).

This conclusion must decide the case so that it is unnecessary to enter into the question of laches.

The decree is affirmed, with costs.

BIRD, C. J., and OSTRANDER, HOOKER, and MCALVAY, JJ., concurred.

INGERSOLL *v.* DETROIT & MACKINAC RAILWAY CO.

1. DAMAGES—SURVIVAL ACT—STATUTES—AMOUNT RECOVERABLE.
   In an action by an administrator for the wrongful death of defendant's employé, neither damages for loss of time or pain and suffering, caused by his injury prior to his death, are recoverable, where the cause of action arose under Act No. 89, Pub. Acts 1905, limiting the amount recoverable to the pecuniary loss suffered by those who were entitled to share in his estate.

2. SAME—PERSONS DEPENDENT—DEATH BY WRONGFUL ACT—NEGLIGENCE.
   Although deceased had a wife and infant whom he had abandoned before his death, and whom he never supported, the law imposed upon deceased a duty to support them and the administrator was entitled to recover for their benefit the probable amount of contributions, whether voluntary or forced, that the widow and child might be expected to have received from him during his expectancy.

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Error to Ogemaw; Sharpe, J. Submitted October 7, 1910. (Docket No. 7.) Decided November 11, 1910.

Case by Elbert V. Ingersoll as administrator of the estate of William Quigley, deceased, against the Detroit & Mackinac Railway Company for the negligent killing of the deceased. A judgment for defendant entered by the court on the opening statement of plaintiff's attorney is reviewed by plaintiff on writ of error. Reversed.

De Vere Hall, for appellant.

James McNamara and *Charles R. Henry* (*Guy D. Henry*, of counsel), for appellee.

STONE, J. The declaration with the rule to plead in this cause was filed January 12, 1909, and set forth in due form actionable negligence on the part of the defendant resulting in the injury to, and death of, deceased, and due care on his part, claiming damages in the sum of $20,000 to himself, in consequence of such injuries, from his loss of earnings, and the pain and suffering that he endured during his lifetime. It also claimed damages in a similar amount for the pecuniary injury sustained by the widow and child as next of kin by reason of being deprived of means of support, and contributions that deceased would have made to them had he lived. After service the defendant appeared and pleaded the general issue.

At the trial the case was disposed of by the court upon the opening statement of plaintiff's counsel of what he proposed to prove. That statement was, in substance, that the suit was brought by plaintiff as administrator of the estate of William Quigley, deceased, one who was employed by the defendant as brakeman on its line of road extending from Gooder, in Ogemaw county, north into Oscoda county; that on November 6, 1906, after dark, he was acting as brakeman on the front end of a train being pushed southerly from Oscoda county into Gooder, and it is the claim of plaintiff that this injury

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arose through the negligence of defendant, as set forth in the declaration herein, and that as a result of such injuries William Quigley died on November 24, 1906, at Rose City, in Ogemaw county. Here counsel for plaintiff made a statement offering to show the death of said William Quigley as a result of such injuries, the appointment of plaintiff as his administrator, the several acts of negligence set forth in the declaration causing the injury to, and death of, deceased, and his want of contributory negligence, and then passed to the subject of damages. He offered to show that at the time of his injury Mr. Quigley was of good health, and about 30 years of age, married to the young girl referred to in the declaration, when she was about 16 years of age, at Two Harbors, near Duluth, in the State of Minnesota; that this marriage was a forced one, brought about because deceased had seduced the girl, and was arrested and confined, and then lawfully married under the laws of that State; that later he had deserted and abandoned her; that there was one child as the result of such marriage, being the one referred to in the declaration; that the widow and child are both still living at Milwaukee, Wis.; and that she had no means of support, other than deceased would either voluntarily contribute, or that which could be forced from him under the law, other than such as her father and her family may contribute. At the time deceased was so injured and died, Mrs. Quigley did not know where he was, and he had never contributed anything either to her support or that of the child; but the marriage was a lawful one, and was so treated and regarded, and she is the lawful widow, and the child is the lawful child of such marriage.

Plaintiff's first contention is that, based on that lawful marriage relation, such widow and child are entitled to have damages assessed with reference to his death for the reason that the law would compel him to contribute to their support, to her during her life, and the child during its minority, and that by his death she and such child lost

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this resource which the law gives them, whether it was a voluntary or involuntary contribution; that contributions are of two characters, one that which the law compels by reason of either the common law, or some statutory declaration arising out of the relationship of the parties, and another which exists by voluntary support given by the deceased to some other next of kin; that the widow and child belong to the first of these, and the fact that no contributions have been made in the past does not deprive them of the right to have damages arising from the death of deceased now assessed; that, as to the second, where the law does not supply forced contributions, it would be necessary to show some act of the deceased, either of contributions in the past, or some situation which would warrant reasonable expectation of contributions in the future, before damages could be assessed. But in this case, and in so far as this branch of the claim of damages is concerned, the plaintiff stands squarely on the legal ground that both the statute and common law of Minnesota, where the marriage took place, of Wisconsin, where the widow and child resided at the time of the death of plaintiff's intestate, and of Michigan, where the death took place, compel him to support his wife and child, and this furnishes a basis on which damages may be assessed.

Passing to the second ground of right of recovery, as stated, the injury took place on November 6, 1906, and plaintiff will show by the proofs that deceased was an intense sufferer from that time until the time of his death, November 24th following. This fact will be disclosed by the testimony of the nurse who was in attendance during 12 of the intervening days, and at the time of his death; and, on the right to assess damages which accrued to deceased by reason of such injury between said days, plaintiff will show that there was in force in this State, at the time of this injury and death, the survival act, being section 10117, 3 Comp. Laws, and the limited liability act, being Act No. 89, Pub. Acts 1905. That under the survival act deceased had a right of action for the 18 days' time that

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he lost between his injury and death, and, in addition to such right, he had a right under the survival act to recover for the pain and suffering that he endured during that time, and that the jury should consider and determine what would be reasonable compensation for such loss of time, plus the pain and suffering so endured. In this statement is excluded all right of action for any prospective damage which would accrue during the probable life of deceased, by reason of his death on November 24, 1906, planting plaintiff's right squarely upon the survival act, which gave deceased during his life the right to recover for the two elements of lost time, pain and suffering, which latter will be shown were large and substantial in amount, and which counsel described in detail. With reference to the effect of Act No. 89, Pub. Acts 1905, it was the claim of counsel that it affected the third element of prospective damages only, and that as to this it was to be measured by the contributions that would probably thereafter be made, the same as under the death act.

At the close of said opening statement, counsel for defendant moved the court to direct a verdict for defendant, for the reason that the opening statement of counsel for plaintiff contained no basis upon which the jury could assess damages. Defendant's motion was granted, and verdict and judgment were directed and entered for defendant. The plaintiff has brought error, and by proper assignments of error two questions are presented:

(1) Did the court err in refusing to permit the jury to assess damages in favor of plaintiff under the survival act (section 10117, 3 Comp. Laws) for the time lost after the injury, and before the death of deceased, and for the pain and suffering then endured by him?

(2) Did the court err in refusing to permit the jury to assess damages in favor of the plaintiff under Act No. 89, Pub. Acts 1905, for contributions, voluntary or forced, that would probably have been made by deceased, in favor of the widow during her probable life, and the child during its minority, for the probable life of deceased, and in directing a verdict?

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We shall consider these questions in the order named.

1. It will be borne in mind that the plaintiff's intestate was injured November 6, 1906, and died November 24, 1906, while Act No. 89, Pub. Acts of 1905, was in force. No action was brought by deceased, and this action was begun by the administrator January 12, 1909. We have no doubt that Act No. 89, aforesaid, fixes absolutely the measure of damages to be recovered, in case of liability. We are of opinion that this question is answered against the contention of plaintiff by the case of *Norblad* v. *Railway Co.*, 156 Mich. 697 (118 N. W. 595). That was a well-considered case. There was a motion for rehearing which delayed its publication in the report. In the meantime *Walker* v. *Traction Co.*, 156 Mich. 514 (121 N. W. 271), was decided, and the *Norblad Case* cited. We must adhere to the doctrine announced in these cases, and hold that the circuit judge decided correctly upon this question.

2. This brings us to the consideration of a more difficult question. The plaintiff claims that even under Act No. 89, aforesaid, the court erred in its refusal to let the jury determine what pecuniary loss the widow and child sustained by reason of the death of the husband of the one, and the father of the other. The circumstances of the case are peculiar. It appears that the marriage was lawful, that the child was born as a result of such marriage, and that at the time the deceased was injured and died the wife did not know where he was, and that he had never contributed anything to her support nor that of the child. The plaintiff contends that contributions of a husband and father may be voluntary, or they may be forced; that the law would compel decedent to contribute to the widow during her life, and to the child during its minority; that by death she and the child lost this resource which the law gives, whether it was a voluntary, or an involuntary, contribution; that the common and statute law of Minnesota, where the marriage took place, of Wisconsin, where the widow and child resided at the time of the death, and

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of this State, where the death took place, would compel the decedent to support his wife and child; and that this furnishes a basis on which damages may be assessed by the jury, just as the court could assess damages, or fix liability, against decedent, had he been arraigned before it for a failure to contribute to their support. The defendant urges that no basis for damages was furnished in the opening statement of counsel; that the wife and child had no reason to expect the husband and father to contribute to their support; that damages must be proved by the circumstances, by capacity to earn, and by disposition to contribute pecuniarily to the aid.

The question, under the circumstances here presented, appears to be a new one in this State. In *Chicago, etc., R. Co.* v. *Bayfield*, 37 Mich. 205, Chief Justice COOLEY said:

"The damages recoverable in a case of this nature * * * are to be assessed with reference 'to the pecuniary injuries resulting from such death. * * *' They have no regard * * * to any *moral* obligations which may have rested upon the deceased to supply their wants. If the *moral* obligation to support near relatives were to be the criterion, we might take their poverty into account as bearing upon the extent of this obligation; but as this may or may not have been recognized, and, if recognized, may have been imperfectly responded to, it is manifest that it can be no measure of the pecuniary injury the family received, or was likely to receive, from the death. What the family would lose by the death, would be what it was accustomed to receive, *or* had reasonable expectation of receiving in his lifetime."

Should it be said in this case, as a matter of law, that the wife and child had no reasonable expectation of receiving any aid from decedent in his lifetime? To sustain the position of the circuit judge would require us to so hold.

It is urged by defendant that there was no basis for assessing damages. Had decedent been proceeded against to compel him to support his wife and child, the same difficulty would have been encountered; and yet we think

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the court would have had no difficulty, after learning all of the facts, to fix a reasonable basis from which to determine the amount. Had this man been killed by a negligent act, an hour after his marriage, and before he had ever contributed a cent to the support of his wife, would it be contended that she had not suffered pecuniary loss thereby? It would seem not. What would be the basis of assessing damages in such a case? We think that they would be determined by showing the circumstances, and by evidence of the probabilities, under proper rules, as in suits brought by parents to recover damages in case of the negligent death of a young child, who had never earned a dollar. *Rajnowski* v. *Railroad Co.*, 74 Mich. 20 (41 N. W. 847). In this case it appears that the husband had abandoned his wife through no fault of hers.

Similar questions have been before the courts of other States. In 6 Thompson's Commentaries on the Law of Negligence, at section 7054, the rule is stated as follows:

"The widow is not prevented from maintaining an action for the death of her husband by negligence, by the fact that she is living in separation from him, unless she has forfeited the right to support from him by leading an abandoned life. Nor will a child be prevented from recovering for the death of his father by the fact that the father had lived away from home for many years, and had not contributed anything to the support of his wife or child"—citing many of the following cases.

In the case of *Ft. Worth, etc., R. Co.* v. *Floyd* (Tex. Civ. App.), 21 S. W. 544, it appears that James H. Floyd and the plaintiff were married at New Albany, Ind., on the 25th day of February, 1887, having met for the first time on the preceding day. A separation soon followed. Early on the morning of April 6th of the succeeding year the husband was killed in a railroad collision at Alvord, Tex. About one month thereafter the surviving wife (this plaintiff) was found to be an inmate of a house of prostitution. She brought this suit for the benefit of herself and the mother of deceased for damages on account of the alleged negligent killing. The court held that the

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wife had forfeited her right to support from her husband, and that the evidence failed to show any reason on her part to expect that he would ever again have contributed towards her support had he not been killed. It was held that here the wife had trampled every claim to marital obligation under foot, and that, while there might be a case of such misconduct on the part of her husband as would preclude this defense, no such case was presented in the record. This case seems to have turned upon the fact of the misconduct of the wife, whereby she forfeited all right to expect aid from her husband.

Gulf, etc., R. Co. v. *Delaney*, 22 Tex. Civ. App. 427 (55 S. W. 538). This was an action for damages for wrongfully causing the death of a brakeman, William Delaney, and the verdict allowed $5,000 to the widow of the deceased, and a like amount to a son by a former divorced wife, which son was 10 years old at the time of his father's death and not shown to have ever received any support from the father. The second wife and this child joined as plaintiffs. The court says:

"Deceased was earning $60 per month at the time of his death, was 31 years old, and was strong, healthy, temperate, and industrious. He had been divorced from his first wife, the mother of his only son. No children were born of the second marriage. To allow the son $5,000 as actual damages upon the showing that the son had never received anything from his father seems to us like allowing a large sum of money where nothing would probably have been received had the deceased lived, and we hesitate to approve so large a verdict merely for the loss of the abstract right of the son to claim a support from his father; but we are unable to distinguish the case from that of *Railway* v. *Culpepper*, 19 Tex. Civ. App. 182 (46 S. W. 922). The case in this respect was thus stated in that opinion:

"'One Culpepper, before his marriage with appellee, had been divorced from his first wife, the mother of Chris and Maud, by a decree which gave to him the custody of Chris and made no provision as to Maud. At the time of the father's death Chris was 12 years and Maud 10 years of age. Maud remained with her mother,

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who is still living. The evidence showed that Culpepper devoted his earnings to his wife and son, and there was no proof that he contributed to the support of his daughter. We are of opinion that Maud Culpepper was entitled to recover, since she had the legal right to support from her father, of which she was deprived by his death'"—citing many Texas cases.

Houston, etc., R. Co. v. *Bryant*, 31 Tex. Civ. App. 483 (72 S. W. 885). This is an action for damages alleged to have arisen upon the death of Will Bryant, instituted by his parents and his widow, Lila Bryant. The appellant requested the following charge:

"If from the evidence you believe that the plaintiff, Lila Bryant, widow of Will Bryant, voluntarily abandoned her husband with the fixed purpose of never returning to him and wholly repudiated the relation of wife to Will Bryant, and had determined not to receive any benefits or aid from him had he lived, then his death under such circumstances inflicted no injury upon her; and, consequently, though you may believe Will Bryant's death was the result of negligence on the part of defendant, no recovery can be had by her."

The court held that this charge was properly refused; that it was a clear invasion of the right of the jury to pass upon the facts and determine whether the wife was damaged by the death of her husband.

Under the circumstances of this case, should not the question of what, if any, sum might the widow and child be reasonably expected to receive from the deceased, have been submitted to the jury? Can it be said as matter of law that the wife would never learn the whereabouts of her husband and proceed against him for support?

De Garcia v. *Railway Co.* (Tex. Civ. App.), 77 S. W. 275, was a suit to recover damages for the death of plaintiff's husband, and to set aside a judgment. The plaintiff, after setting up her cause of action against the company on account of the death of her husband, Alcario Garcia, alleged that he had left surviving him by a former marriage two minor children, naming them, and that they had, therefore, in the same court, through their next

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friend, instituted suit for damages and recovered a judgment. Fraud and collusion were charged against the minors and the defendant to defeat the claim of the widow. It appeared that several years prior to his death Alcario Garcia was married to the plaintiff, Josephine. In a former suit it had been found that the plaintiff widow had not, for more than two years prior to the death of the husband, received any pecuniary aid from him, and was not receiving any pecuniary aid from him at the time of his death, and would not have received any pecuniary aid from him had he lived. This court held that it was incumbent upon the children to act in good faith with those joined with them in the suit; that the wife, so long as she had not acted in any way to forfeit it, was entitled to support at the hands of her husband; and that a party wrongfully killing him cannot deprive her of damages by a plea that the husband had not been fulfilling the duties he owed his wife.

In *Dallas, etc., R. Co.* v. *Spicker*, 61 Tex. 427 (48 Am. Rep. 297), a judgment of $5,000 was awarded in favor of the wife for the death of her husband. The defendant asked the court to charge the jury that if the husband had left his wife and had no further communication with her, and the jury believed from the evidence that he had abandoned her for good, and at the time of his death she had no reasonable expectation of deriving any aid or advantage from the continuance of his life, then she would be entitled to but nominal damages. In holding that the defendant was not entitled to such request, the court said:

"Henry Spicker (the husband) may have left his wife for a year or more before his death, and after leaving her may have had no further communication with her, and may have intended never to return to her, or contribute to her support; yet so long as the marital relation existed, without reference to the will of the husband, the wife not being shown to have forfeited her right thereto by her own wrong, she was entitled to a decent support in accordance with their station in life from her husband. The

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marital relation created this right, and it would have continued to exist so long as the relationship continued; and so, without reference to the will of the husband. There is no legal presumption that such relation would ever have been dissolved prior to the time when one of the parties thereto, in the ordinary course of events, would have died. The wrong of the appellant terminated the relationship, by causing the death of the husband prior to the time when, in the ordinary course of events, he would have died, and thereby deprived the wife of that pecuniary support and benefit which the law would have entitled her to from her husband so long as they remained husband and wife."

Baltimore, etc., R. Co. v. *State, for Use of Chambers*, 81 Md. 371 (32 Atl. 201). This was an action brought in the name of the State, as plaintiff, for the use of the widow and child of John W. Chambers, who was killed by what is alleged to have been the wrongful act, neglect, and fault of the defendant corporation. There was a verdict for the plaintiff and judgment thereon, from which the defendant has appealed. The court says:

"The appellant's sixth prayer contained a proposition which we think is not sustained either by reason or authority. It asks the court for instruction that if they find that the decedent had been separated from his family for a period of about 12 years immediately preceding his death, and that he had contributed nothing to the support of his wife or infant child during that period, that then the plaintiff was only entitled to nominal damages. In this we do not concur. The marital relation still continued to exist between the parties at the time of the death of the husband; and, whilst they had not, for the period stated, lived together as man and wife, her legal rights had suffered no change or impairment. It is very clear from the testimony in the record that the wife had not by her own wrong forfeited her right to a decent support from her husband in accordance with her station in life. The marital relation created this right, and it continued to exist in law to the death of the husband; and this, too, without reference to the will or wishes of the husband."

See, also, note to *Eichorn* v. *Railroad, etc., Co.* (La.), 3 Am. & Eng. Ann. Cas. 103.

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It is the claim of the plaintiff that the question here is analogous to the one presented to this court in *Clinton* v. *Laning*, 61 Mich. 355 (28 N. W. 125), where a father brought action against the sellers of liquors to recover damages for loss, by being compelled to support an adult son given to drink, who became intoxicated at defendants' tavern and sustained injury. It was there held that contributions, whether voluntary or forced, may be included as an element of damages.

We are of opinion that the second question should be answered in favor of the plaintiff, and that the circuit judge should have permitted the case to go to the jury, under the proposed evidence, to determine as to the liability of defendant; and, if any was found, to assess damages, if any, for the contributions, voluntary or forced, that would probably have been made by deceased in favor of the widow during her probable life, if not exceeding the probable life of decedent, and for the child during its minority.

For the error pointed out, the judgment is reversed, and a new trial granted.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

MINTZ *v.* JACOB.

1. ELECTION OF REMEDIES—INCONSISTENT THEORIES—ASSUMPSIT. The commencement of an action upon one of two inconsistent claims amounts to an election, and, although the action may be discontinued and recommenced, the plaintiff may not maintain suit upon the abandoned theory.

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2. SAME—FRAUD—WAIVER OF TORT—ASSUMPSIT.
It is not an election, which would bar a subsequent action of tort, for plaintiff to commence in assumpsit under 3 Comp. Laws, § 10421, for fraud in obtaining money through false pretenses.

3. SAME—CONSTITUTIONAL LAW.
A statute permitting a plaintiff to commence an action, based upon fraudulent representations or conduct, in assumpsit, is within the legislative authority.

4. SAME—ESTOPPEL.
No estoppel arises from plaintiff's attempt to commence an action of assumpsit by capias under 3 Comp. Laws, § 9998, so as to bar or defeat a subsequent action *ex delicto* for the same fraud, after being nonsuited in the original cause.

Error to Wayne; Hosmer, J. Submitted October 6, 1910. (Docket No. 9.) Decided November 11, 1910.

Case by Samuel Mintz against Ben B. Jacob for fraud. Judgment for defendant on motion to quash the writ. Plaintiff brings error. Reversed.

Philip A. McHugh and *William Henry Gallagher*, for appellant.

Miner, Anhut & Chaddock (*John Miner*, of counsel), for appellee.

HOOKER, J. Claiming that defendant had aided and abetted one Rappaport in securing, through false pretenses, from the plaintiff, a sum of money to be used by the latter in redeeming certain alleged diamonds, then in pawn to the defendant, plaintiff brought assumpsit under 3 Comp. Laws, § 10421, on September 8, 1909, commencing the action by capias. The writ was afterward, and on October 4, 1909, quashed for failure to file a declaration. A voluntary nonsuit was thereupon submitted to by plaintiff, but the order was not entered. On October 7, 1909, a new and similar action was begun, whereupon defendant pleaded the pendency of the former action, and

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this plea was sustained, and the writ quashed. On January 12, 1910, plaintiff instituted an action of trespass on the case for the same fraud and deceit. Capias issued, and defendant was arrested for a third time. The defendant's counsel thereupon moved the court to quash the writ and vacate the order holding defendant to bail, upon the ground that plaintiff had by his first two prosecutions in assumpsit elected his remedy, and was thereby precluded from thereafter suing in trespass on the case for the same cause, which it is maintained, is a different and inconsistent remedy.

"(10421) SECTION 1. *The people of the State of Michigan enact,* that in all cases where, by the fraudulent representations or conduct of any person, an injury has been or shall be produced, either to the person, property or rights of another, for which an action on the case for fraud or deceit may by law be brought, an action of assumpsit may be brought to recover damages for such injury, and in all such cases a promise shall be implied by law to pay all just damages arising from such fraud or deceit, and may be so declared upon."

The affidavits for capias and the declarations in the three actions were similar, if not identical, in the description of the wrong sued upon, and the measure of damages in all would be the same. Under the statute referred to, it was optional with the plaintiff to select either form of action. It is settled by our decisions that, where a plaintiff has a choice between inconsistent *claims*, the commencement of action upon one theory constitutes an election, and, while he may discontinue and sue again upon the same claim, he cannot be allowed to sue upon an inconsistent claim. Thus one who sues for the price of a horse sold by him, or for damages, for a breach of the contract cannot, after discontinuance or defeat, maintain an action of trover for the unlawful conversion of the horse, or replevin for its unlawful detention. The reason is apparent. Having affirmed the contract and the ownership of the defendant by the first suit, trover or replevin would be an inconsistent claim. This rule is not confined to in-

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stances where the actions are assumpsit and an action *ex delicto*. After assumpsit for a breach of contract, another action of assumpsit to recover the consideration paid on the contract upon the ground of rescission will not lie when the plaintiff had a choice of remedies. It is the inconsistency of the demands, which makes the election of one right of action an estoppel against the subsequent assertion of the other, and not the fact that the forms of action are different. Doubtless resort to one remedy may be conclusive of the exercise of a choice between inconsistent claims, and constitute an estoppel, but we think not in this case. At common law an action of assumpsit would not lie in this case, and this declaration would be bad on demurrer, for it sets up and relies on the fraud, and does not state a cause of action resting on contract. There would be no estoppel by the attempt to bring assumpsit, for the reason that there was no right to bring assumpsit, and plaintiff might afterwards sue in case.

But our statute gives the right to a plaintiff in a case like this to set up the fraud and deceit, and recover the damages suffered either in an action of case, or, in form, assumpsit, and there is no inconsistency, for in each the same wrong is alleged and the same injury. The legislature has the power to permit recovery for a tort in an action in form *ex contractu* if it chooses to do so, as we intimated in *Hallett* v. *Gordon*, 122 Mich. 573 (81 N. W. 556, 82 N. W. 827), where we ordered a new trial in a case somewhat similar to this. (See, also, *Hallett* v. *Gordon*, 128 Mich. 364 (87 N. W. 261). In some States the differences in form of action are abolished, and all declarations or petitions merely allege the facts relied on. This is within the legislative authority, and in our former Constitution the Supreme Court was given authority to make rules with a view to simplifying the practice. Const. 1850, art. 6, § 5. The cases bearing on the question discussed will be found in 2 Michigan Digest, p. 742, under the title "Election of Remedies," and, in our opinion, fully support the conclusion that we have reached in this

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case. See 15 Cyc. p. 259 *et seq.*; 9 Cur. Law, p. 1037; 13 Cur. Law, p. 1397.

Counsel for the defendant urge in further support of their claim that a capias for a cause of action alleged to arise upon contract must be brought under section 9996, 3 Comp. Laws, and that such section gives the right to plaintiff to have a capias issued and arrest made without an order to hold to bail being previously indorsed, and the further right to a bond in twice the amount that the plaintiff is entitled to recover, as shown by the affidavit, while section 9998 covers claims for damages other than those arising upon contract express or implied, and in these an order to hold to bail in a discretionary sum to be fixed by the magistrate must precede the arrest, and therefore plaintiff, having first elected to proceed under the former, is now estopped to commence under the latter, section. The sections read as follows:

"(9996) SEC. 13. Personal actions arising upon contract, express or implied, may be commenced by *capias ad respondendum* only to recover damages for any breach of promise to marry, or for moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment, or in case of fraud or breach of trust, when the plaintiff, or some one in his behalf, shall make and attach to such writ an affidavit, stating therein that the plaintiff has a claim for damages against the defendant for the cause of action stated in the writ, and upon which he believes that the plaintiff is entitled to recover a certain sum, being more than one hundred dollars."

"(9998) SEC. 15. Personal actions may be commenced by *capias ad respondendum*, in cases of claims for damages other than those arising upon contract, express or implied, where an order for bail shall be endorsed on the writ by a judge of the court from which the writ issues, or a circuit court commissioner, directing the amount in which bail is to be taken."

Without implying the correctness of defendant's claim were the facts as stated above, we have only to look at the several affidavits to see that they are not, and that

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defendant has nothing but the fact that the action first brought was in assumpsit to support his claim. In each case the affidavit set up fraud and deceit, and made no claim to damages arising on contract. It alleged neither that it arose on contract nor the "belief that plaintiff was entitled to a sum certain," as required by section 9996. If we may credit the defendant's brief, an order to hold to bail as required by section 9998 was obtained in each case, and, in short, it is obvious that plaintiff was attempting to proceed under section 9998, in each instance, which he had the clear right to do, upon the facts set forth in any one of his affidavits, either in assumpsit or case under the statute (3 Comp. Laws, § 10421). All three actions were identical in substance, differing only in the name. The elements of an estoppel are lacking, and there was no merit in the motion to quash, which should have been denied.

The judgment is reversed, with costs.

BIRD, C. J., and OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

GEHL v. PITTSBURG COAL CO.

1. MASTER AND SERVANT—SAFE PLACE—PROXIMATE CAUSE.
   No liability for failure to furnish a safe place arises between employer and employé where the unsafe condition consisted of holes that had been cut in a dock upon which the servant was employed, and that were not shown to have contributed to his death.

2. SAME—WARNING AND INSTRUCTING SERVANT—KNOWLEDGE OF SERVANT.
   Failure to warn a servant is not actionable where no evidence

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tends to show that the servant did not know of the alleged dangers, that he was not warned, or that the negligence caused his injuries.[1]

8. SAME — COVERING COGS — STATUTES — CONTRIBUTORY NEGLIGENCE.

An employé who was killed in a place of danger to which he voluntarily went, among moving machinery, in a place not intended for men to work, except when the machinery had been stopped, was guilty of contributory negligence which precluded plaintiff's recovery for the failure of his employer to cover dangerous cogs, under Act No. 118, Pub. Acts 1901.[2]

Error to Chippewa; Steere, J. Submitted October 7, 1910. (Docket No. 16.) Decided November 11, 1910.

Case by Minnie Gehl, administratrix of the estate of Albert Gehl, deceased, for the negligent killing of plaintiff's intestate. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

John W. Shine, for appellant.

Warner & Sullivan, for appellee.

HOOKER, J. This case is the outgrowth of a distressing accident, in which a young man lost his life. He was fireman on a derrick used for unloading coal from a vessel. The derrick was upon a dock, and he went below the deck or floor of the derrick for some purpose unknown, though the most probable theory is that it was to loosen the bolts in the cylinders of a small steam engine, thus allowing the water to escape and prevent freezing during the coming night. This engine was not in operation at the time, though the machinery of the derrick was, and he was caught and crushed between the cogs of a pinion

[1] As to duty to warn or instruct servant, see note in 44 L. R. A. 88.

[2] On question of contributory negligence as defense against violation of master's statutory duty, see note in 18 L. R. A. (N. S.) 1152.

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and of a circle, the operation of which turned the boom or arm of the derrick. The negligence charged was:

(1) Not furnishing a safe place to work.
(2) Not warning deceased of the dangers of the place.
(3) Not covering the gearing mentioned.

The first claim relates to some holes in the dock; but there is no testimony showing that the deceased stepped in any hole, or that they in any way had to do with the accident. The most of them were cut in the dock by the firemen, of whom he was one, for the purpose of putting a hose through to obtain water.

Second. **Failure to Warn.** We have no evidence that the deceased was not aware of all dangers, nor is there any evidence that he was not warned by defendant. Neither is there anything tending to show that a failure to warn was the cause of the accident.

Third. **Failure to Cover the Cogs of the Pinion.** It is said that it does not appear that it was possible to cover the gearing in which deceased was crushed, and that there was no legal obligation to protect it in any way further than was done. It is true that it was not in a place where men worked, except as they went below to oil, tighten up, or repair and adjust the machinery, or loosen the cylinders, all of which might have been done with safety, and usually was so done, when the machinery was not in motion. We are not sure that the machinery of this derrick might not be held to be within the provisions of section 8, Act No. 113, Pub. Acts 1901, though there are strong reasons for saying that it is not.

We do not find it necessary to decide that question, however, for the reason that the undisputed proof leaves no room for an inference that the deceased was not, at the time of the accident, voluntarily in a place of extreme danger, which was apparent, and which any person of his age and ordinary sense would have known; and while, under the decisions of *Sipes* v. *Starch Co.*, 137 Mich. 258 (100 N. W. 447), and *Swick* v. *Cement Co.*, 147

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Mich. 466 (111 N. W. 110), the application of the statute to this case, were it applicable, would preclude the doctrine of assumption of risk as a defense, these cases do not preclude the defense of contributory negligence. On the contrary, the latter case shows that the statute has not cut off that defense. We therefore feel constrained to say that the undisputed evidence shows that the accident was wholly due to the victim's own carelessness.

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

In re CHOATE'S ESTATE.

BONINE *v.* GAGE.

APPEAL AND ERROR—AMENDMENT—FACTS ARISING AFTER DECREE.

In a suit in chancery for an accounting in which, on appeal, after a decree for defendant, the circuit judge presented a return showing that an error had been made in the record as to his findings, and on petition of the defendant to present additional facts that affect the merits of the case and that arose after the decree, the record will be remanded for amendment.

Ira B. Gage, executor of the estate of Nelson F. Choate, deceased, presented his final account in the probate court for the county of Cass. It was contested by his successor, Wilbur G. Bonine, administrator *de bonis non*. Both parties appealed from the order entered in probate court. A judgment of the circuit court was entered on appeal, charging the executor with the value of certain stock of

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deceased. Both parties took out writs of error: On motion to remand the record for correction. (Docket No. 64.) Granted, November 11, 1910.

James H. Kinnane, for the motion.

M. L. Howell, contra.

MOORE, J. The original case was submitted at the June term. It involves the accounting of Mr. Gage as executor of the estate of Nelson Choate, deceased. Certain stock belonging to Mr. Choate came into the possession of Mr. Gage, who became a bankrupt and then resigned as executor. Mr. Gage kept this stock with his private papers in the vault of a bank where he was cashier. The bank failed, and Mr. Kimmerle was appointed trustee in bankruptcy, and took possession of the stock, and refused to give it up. It is sought to have Mr. Gage and his bondsmen pay for this stock upon the basis of what it might have been sold for, less its present value. The circuit judge found in favor of the administrator.

Since the case came into this court the circuit judge has sent in an informal return, to the effect that there is a mistake made in the record as to what his findings were. Mr. Gage, executor, has now filed a petition which states, in substance, that he has now been able to secure the stock, and to bring it into court for the administrator *de bonis non*, and asks leave to be allowed to do this, or to have the record remanded, with leave to do it in the lower court.

I think an opportunity should be given to have the return of the judge corrected, and to have the record show the present status of the stock, so that a complete disposition of the controversy can be made.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

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KRZYSZKE *v.* KAMIN.

1. MALICIOUS PROSECUTION — INJUNCTION — CIVIL ACTION—AVERMENTS OF BILL OF COMPLAINT.

   Malicious prosecution lies for the wrongful issuance of an injunction to restrain a defendant from disposing of his personal property, upon averments of a judgment creditor's bill making him a party, praying for an injunction against other defendants, not including him; the issuance of the process being unsupported by the necessary averments in complainant's bill, which failed to show probable cause for the restraining writ.

2. SAME—DAMAGES—EVIDENCE.

   A liberal rule should be applied in admitting evidence of damages in such action, and all the facts and circumstances having any tendency to show damages or their probable amount, should, in view of the difficulty of arriving at a result, be placed before the jury.

3. SAME—DIRECTING VERDICT—EVIDENCE—PRESUMPTIONS.

   It was not error to leave to the jury only the question of damages, where a want of probable cause appeared, and the presumption of malice thereby arose, and the presumption was not rebutted by any evidence.

4. COSTS—STATUTES—JUSTICES OF THE PEACE.

   A judgment of $100, in an action of malicious prosecution, warrants the award of costs in favor of plaintiff under 3 Comp. Laws, § 11257, since justices of the peace have no jurisdiction of that form of action.

Error to Wayne; Rohnert, J. Submitted October 12, 1910. (Docket No. 45.) Decided November 11, 1910.

Case by Ludwig Krzyszke against Gustave Kamin, for the malicious prosecution of a civil action. Judgment for plaintiff, and defendant brings error. Affirmed.

James H. Pound, for appellant.

Guy A. Miller, for appellee.

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STONE, J. This is an action on the case for damages for an alleged malicious prosecution by the issuance of an unauthorized injunction against the plaintiff. The declaration was inartificially drawn, but, not having been demurred to, is, we think, sufficient to support a recovery. It avers that, to wit, on March 1, 1908, the plaintiff was a resident of the township of Huron, in the county of Wayne, and was there the owner and in possession of certain personal property, to wit, a quantity of potatoes and hay, of the value of $500; that he had advertised an auction sale of said property to be held on said day; that said sale had been advertised extensively, and that, to wit, 300 persons assembled upon plaintiff's premises to attend said sale, and bid upon and purchase said personal property; that it was the duty of defendant to refrain from interfering with the possession and enjoyment by said plaintiff of said property, and from selling said personal property; and that it was the duty of defendant to refrain from taking any wrongful action of any nature, particularly the unlawful, wrongful, or malicious issuance of the writ of injunction and service thereof upon plaintiff, the result of which would be to hinder, interrupt, or disturb plaintiff in the use, enjoyment, or sale of said farm produce. But plaintiff avers that said defendant did wrongfully, unlawfully, and maliciously cause the issuance of a certain writ of injunction out of the circuit court of Wayne county, which writ was directed against this plaintiff and others, and plaintiff avers that there was no lawful cause whatever for the issuance of said writ of injunction; that said writ was issued without the authority or direction of any of the judges of said court, and was caused to be issued by said defendant through his attorney; that said injunction was thereafter served upon this plaintiff. Plaintiff avers that by reason of the unlawful issuance and service of said injunction he lost the sale of said personal property, and was put to great expense and damage in connection therewith, and lost the profit in said sale, to plaintiff's

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damage in the sum of $500. The plea was the general issue.

Upon the trial of the case, the plaintiff offered in evidence the bill of complaint in the cause in which the injunction was issued, as well as the writ of injunction and the return thereon indorsed. Said bill of complaint was a creditor's bill in which this defendant, Gustave Kamin, was complainant, and Charles Kamin, Julius Kamin, with their wives, and this plaintiff were defendants. After setting forth and describing two certain judgments which the complainant therein had obtained against said Charles Kamin and Julius Kamin, and the issuance and return of executions thereon unsatisfied, and that said judgments were still in force and unsatisfied, said bill contained the following averment:

"And your orator further shows that he has been informed and believes it to be true that the said Charles Kamin and Julius Kamin have a considerable amount of money and of legal and equitable debts, claims, and demands due them from different persons whose names are unknown to your orator, and that one Ludwig Krzyszke is their debtor in the sum of about $600, and for other sums of money and other personal property either in possession or held in trust for them (except such trust as has been created by, or the funds held in trust has proceeded from, some person other than the said Charles Kamin and Julius Kamin), the situation, value, and particulars of which are unknown to your orator. And your orator is fearful that the said Charles Kamin and Julius Kamin will make way with or place the same beyond the control of this court, or a court of law."

The above contains the only reference there is in said bill to the said Ludwig Krzyszke, except as hereinafter stated. There was no prayer for relief or for injunction as against him. The bill did pray that said Charles Kamin and Julius Kamin, and their attorneys, agents, etc., be enjoined from collecting, receiving, selling, transferring, assigning, delivering, or in any manner using, controlling, interfering, meddling with, or disposing of any debts or demands due to them, or any real or personal

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estate, goods, wares, merchandise, account books, bills, checks, promissory notes, bonds, mortgages, judgments, or other securities, things in action, property, or effects, whether in their own names or hands, or in the names or hands of, or held by, any other person or persons for them, and for their use or benefit, or in trust for them, express or implied, except where such trust has been created by, or the funds held in trust has proceeded from, some person other than the said Charles Kamin and Julius Kamin, until the further order of the court. The only other place in said bill in which the said Ludwig Krzyszke was named was in the prayer for process, which read as follows:

"May it please this court to grant unto your orator the writs of subpœna and injunction issuing out of and under the seal of this honorable court to be directed to the said Charles Kamin, Julius Kamin, Caroline Kamin, Elizabeth Kamin, Ludwig Krzyszke, commanding them at a certain day and under a certain penalty, therein to be inserted, personally to be and appear before this honorable court, then and there to answer," etc.

Upon this bill was the following indorsement: "Let an injunction issue as prayed"—signed by the circuit judge.

The writ of injunction was issued against the said Ludwig Krzyszke and the other defendants named in said bill, in the usual form, commanding him and them to absolutely desist and refrain from incumbering his or their property in any way until the further order of the court. Said injunction was served upon this plaintiff on the morning, and at the place, of the proposed sale, and after a large number of persons had assembled, as the plaintiff claims, to bid upon said property; and he gave evidence tending to show that such service of injunction resulted in breaking up the sale, and prevented him from making an advantageous disposition of his said personal property, and especially the hay, which he claims amounted in quantity to about 20 tons. It is undisputed that said in-

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junction was dissolved and dismissed as against this plaintiff, by consent of complainant's solicitor in said chancery cause, on the day after it was served, and the suit later dismissed.

Upon the trial of the case, the plaintiff gave evidence tending to show the value of the hay on the day of the proposed sale, and the offers he had received for it; that persons were there ready to purchase, and the circumstances of the occasion; that by reason of the distance from a shipping point, and the bad roads which immediately followed, and notwithstanding his best efforts to sell, he suffered damage in a large sum by being obliged to accept a greatly reduced price for said hay. The jury gave the plaintiff a part only of his claimed damages. The defendant has brought the case here upon writ of error, and the record contains 40 assignments of error. It will not be necessary to consider these assignments separately. They may be classified as follows:

(1) That the court erred in submitting the case to the jury, because plaintiff made no case by his evidence, and the action of malicious prosecution will not lie in such a case.
(2) Alleged errors in the admission of evidence.
(3) Errors alleged in the charge.

Upon the trial of the case in the circuit court, and upon the argument in this court, defendant's attorney claimed that the bill of complaint, by its averments, entitled the complainant therein to an injunction such as was issued against the plaintiff herein, and that the only error was a clerical one, of omitting to name the plaintiff in the prayer for injunction in the body of the bill. In this claim we cannot agree with counsel. An examination of the bill discloses that it did not contain any substantive averment entitling the complainant therein to an injunction restraining the said Ludwig Krzyszke from incumbering his property. The writ of injunction was therefore unauthorized, as to him. This want of authority, however, did not appear upon the face of the writ, and the conduct of this

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plaintiff in obeying its mandate was commendable. It must be held, however, that there was no probable cause for the issuance of the writ. That it was issued at the instance of this defendant, acting by his solicitor, is not denied, and clearly appears. This brings us to the consideration of the first point raised by defendant.

1. The right to maintain this action was recently discussed by this court in *Powers* v. *Houghton*, 159 Mich. 372 (123 N. W. 1108). After referring to the English rule and stating that it has been somewhat modified in this country, the opinion quotes from 1 Cooley on Torts (3d Ed.), at page 345, as follows:

"In some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule."

Justice BROOKE says:

"Among those malicious civil suits giving a right of action he (Cooley) enumerates arrest, attachment, garnishment, insanity cases, injunctions, receivers, and other suits that interfere with person or property. Under the last class of cases, he says (page 348):

"'So a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with, by the appointment of a receiver, the granting of an injunction, or by writ of replevin. * * *

"In our own State, the case of *Brand* v. *Hinchman*, 68 Mich. 590 (36 N. W. 664, 13 Am. St. Rep. 362), is to some extent applicable. There, an attachment was sworn out by defendant, Hinchman, and placed in the sheriff's hands for service. A deputy visited Brand's store, but made no actual levy, the subject-matter of the suit being adjusted. The court found, however, that there was at least a technical taking and possession of Brand's property, and the proofs showed that damage resulted to his business as a result of the swearing out of the writ (without probable cause). The case of *Antcliff* v. *June*, 81 Mich. 477 (45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533), is authority for the proposition that a gross and fraudulent abuse of the process of the court, resulting in

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damage, gives a right of action to the person sustaining the damage."

We need not quote authority to the effect that want of probable cause raises a presumption of malice, in an action for malicious prosecution.

We might properly dismiss this subject here, but there is such an abundance of authority, to the like effect, outside of Michigan, that we refer to some text-writers and decisions. 22 Cyc. p. 1061; 16 Am. & Eng. Enc. Law (2d Ed.), p. 440, and cases cited. In 2 High on Injunctions (4th Ed.), § 1648, the author says:

"Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause, and the rule has been broadly stated that no such right of action exists, and that his only remedy is by suit upon the injunction bond. The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action on the case will lie. *Cox* v. *Taylor's Adm'r*, 10 B. Mon. (49 Ky.) 17; *Mitchell* v. *Railroad*, 75 Ga. 398. But to support such action, the plaintiff's pleadings must clearly negative the existence of probable cause for the injunction. It will not suffice to allege that the writ was unjustly and wrongfully sued out, but there must be distinct allegations of malice or a want of probable cause" —citing many cases. *Mark* v. *Hyatt*, 135 N. Y. 306 (31 N. E. 1099, 18 L. R. A. 275); *Short* v. *Spragins*, 104 Ga. 628 (30 S. E. 810); *Asevado* v. *Orr*, 100 Cal. 293 (34 Pac. 777).

The last above case holds that an action on the case for damages will not lie for improperly suing out an injunction, unless complainant charges an abuse of a process of the court through malice and without probable cause. If the act complained of is destitute of these ingredients, the only remedy of the party is an action upon the injunction bond.

In 1 Joyce on Injunctions, § 175, it is said:

"Where a party in good faith and on a fair representation of the facts procures a writ or order of injunction, he

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is not liable in an action for the damages which the injunction has caused to the person enjoined, unless he has given a bond or other security for the payment of such damages. In other words, in the absence of such security, the defendant has no remedy for any damages he may sustain from the issuing of the injunction, unless the conduct of the plaintiff has been such as to give ground for an action of malicious prosecution"—citing in the note *Cayuga Bridge Co.* v. *Magee*, 2 Paige (N. Y.), 116–122.

"Where a party in good faith, and on a fair presentation of the facts to a court, or to a judicial officer, procures a writ or order of injunction, he is not liable in an action for the damages which the injunction has caused to the person enjoined. Such is the rule as to any process or order in the nature of process thus procured. Where process sued out by a party is afterwards set aside for error, the party is not liable in an action for damages; where it has been set aside for irregularity or bad faith in obtaining it, he may be." *Palmer* v. *Foley*, 71 N. Y. 106—citing *Williams* v. *Smith*, 108 Eng. Com. Law Rep. (14 Com. Bench [N. S.], 596) 594.

See, also, *Miller* v. *Adams*, 52 N. Y. 409; *Carl* v. *Ayers*, 53 N. Y. 14.

In *Miller* v. *Adams*, *supra*, which was an action for false imprisonment, it was held that one who applies to a judge to issue an attachment for the arrest of another, and who receives and delivers it to the sheriff for service, is liable for the arrest in case the attachment is void for want of jurisdiction in the judge, or for any other cause. Grover, J., said:

"Plaintiff claims that the judge had not acquired jurisdiction of the subject-matter, and had no authority to issue the attachment, and that, therefore, his arrest and detention thereon was wrongful, for the redress of which he can maintain this action. If he is right in the premises, he clearly is in the conclusion, both upon principle and authority. The question is whether the judge had jurisdiction to issue the attachment. Before examining this question, it may be well to consider the point made by the defendant's counsel that, conceding that the judge had no jurisdiction to issue the attachment, still the defendant is not liable for the arrest of the plaintiff thereon, upon the ground that a party applying to a court, or judicial officer,

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having jurisdiction of the subject-matter presenting his case to such court, or officer, is not responsible for the action taken thereon by such court, or officer. Counsel cites *Von Latham* v. *Libby*, 38 Barb. [N. Y.] 339, to sustain this position. The principle upon which that case was decided has no application to the facts of the present case. There, all that was done by the defendant was to present the case for the action of the magistrate. Here, the attorney of the defendant applied to the judge to issue the attachment, and delivered it to the sheriff for service. This clearly made the defendant liable in case the attachment was void for want of jurisdiction in the judge, or for any other cause."

In *Mark* v. *Hyatt*, 135 N. Y. 306 (31 N. E. 1099, 18 L. R. A. 275), the court said:

"No action of trespass will lie to recover the damages unless the prosecution is alleged and proved to have been malicious and without probable cause. We have held that doctrine quite firmly and clearly, in cases of injunctions, declaring in substance that, although the restraining order ought not to have been granted, and was set aside for that reason, yet the damages incurred where the proceedings have been regular, cannot be recovered in the absence of an undertaking, except upon the basis of malicious prosecution"—citing *Lawton* v. *Green*, 64 N. Y. 326; *Palmer* v. *Foley*, 71 N. Y. 106.

In *Cox* v. *Taylor's Adm'r*, 10 B. Mon. (Ky.) 17, the court says, at page 20:

"And the principle is the same, whether the malicious proceeding be a criminal prosecution or a civil suit. In either case the wrong consists not merely in the falsity and consequent injustice of the charge or claim, but in its being made by legal proceeding without probable cause, and, therefore, as the law decides, from malicious motives alone. This want of probable cause, being the essential ground of the action, must be alleged and proved in order to sustain it. If there be probable cause, though the charge or claim be false, and therefore unjust or wrongful, the most express malice will not be sufficient. Therefore the allegation that the party had maliciously, or falsely, or unjustly, or wrongfully, instituted the former proceeding, will not supply the want of the allegation that he did it without probable cause; which, although it need

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not be stated in these express words, must be stated in some form of substantive averments, or must at least be shown clearly in the declaration."

Newark Coal Co. v. *Upson*, 40 Ohio St. 17. The Newark Coal Company, a corporation, with malice, and without probable cause, sued one Upson and others in a civil action, and, by the order of injunction made on its *ex parte* application, prevented Upson and others from entering upon and enjoying their property, and also from prosecuting a profitable business. After a year had passed the Newark Coal Company dismissed its action. Upson and others thereupon sued the company claiming damages for said malicious prosecution.

(1) It was held that they could maintain the action.
(2) That the measure of damages is the value of the right of Upson and others to possess their property and prosecute their business during said period of ouster and suspension, *i. e.*, the value of the use of the property in the business, during that time.

Granger, C. J., said:

"It may now be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained, whenever, by virtue of any order, or writ, issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use, or enjoyment, of property of value. The name or form of the writ or process is immaterial. It may be an order of arrest, or of attachment, or of injunction. The malicious prosecutor cannot shield himself behind the interlocutory order of the judge, based upon his own malicious *ex parte* application and affidavit." *Newark Coal Co.* v. *Upson, supra.*

See, also, *Mitchell* v. *Railroad*, 75 Ga. 398.

2. We have carefully examined the assignments of error relating to the admission of evidence. Bearing in mind the nature of the case and the difficulty in arriving at the exact amount of damages suffered, all the facts and circumstances of the case, having any tendency to show damages, or their probable amount, should be placed be-

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fore the jury, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. *Allison* v. *Chandler*, 11 Mich. 542. Note the liberal rule adopted in the admission of testimony in *Brand* v. *Hinchman*, *supra*. We find no error of which defendant should complain in the rulings of the circuit court in the admission or rejection of testimony.

3. Was there error in the charge of the court? Bearing in mind that there was entire want of probable cause in the issuance and service of the writ of injunction, and the correlative rule that want of probable cause, in itself, raises a presumption of malice, under the law, and that there was no evidence to rebut that presumption, we do not think there was error in charging the jury that the only question to be considered was one of damages. The following excerpt from the charge indicates its tenor:

"It appears that this injunction was served upon him (the plaintiff) and prevented him from selling the property. There is nothing in the bill of complaint which warranted any injunction against this plaintiff, such as this injunction purports to be, and for that reason I say to you that the only question is: Did the plaintiff suffer damages by reason of the service of this injunction, and, if so, what was the damage? The burden is upon the plaintiff to show by a preponderance of the evidence that he suffered damage. If he fails to show that he suffered damage, he is only entitled to a nominal verdict at your hands of six cents. If he has established that he has suffered damages, it is your duty to assess the damages, and find a verdict in his behalf for the amount you assess. Now, gentlemen of the jury, the measure of damages is the difference between what he was able to obtain for the goods which he was prevented from selling, at the time and place of this sale of March 25, 1908—the difference between what he was able to realize on that sale at the time and place, and what he could have acquired for that stuff by the exercise of reasonable diligence on his part, after the injunction was dissolved. This injunction was served on him on the morning of March 25, 1908, and the next day in the afternoon, after the close of court, or thereabouts, or at the close of court's business, by mutual agreement, the injunction was dissolved, and he was re-

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lieved from the restraint upon his power to sell the property. The property involved is hay in the mow as disclosed by the testimony, and the potatoes."

Complaint is made because the court here referred to the potatoes as being involved in the suit. There is no evidence of any damage as to the potatoes. They were included in the declaration, and there was some evidence as to the quantity. In the entire remainder of the charge the jury's attention is directed solely to the claimed damages on the hay. We do not think that the jury were misled by this reference, and we find no error in the charge.

Some claim was made that there was error in awarding costs to the plaintiff; but as the recovery was $100 damages, and as a justice of the peace has no jurisdiction in a case of malicious prosecution, and in view of section 11257, 3 Comp. Laws, we do not discuss the claim.

The judgment of the circuit court is affirmed.

BIRD, C. J., and OSTRANDER, BROOKE, and BLAIR, JJ., concurred.

VOLLRATH v. VOLLRATH.

DIVORCE—EXTREME CRUELTY—APPEAL—PRESUMPTION.

A decree of divorce in favor of a husband for extreme cruelty of his wife, who was charged with improper conduct with other men and with threatening to kill the complainant, will be affirmed on appeal where the testimony, considered in the light of the presumption arising from the opportunity of the trial court to see and hear the witnesses, supports his conclusion.

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Appeal from Wayne; Rohnert, J. Submitted October 13, 1910. (Docket No. 54.) Decided November 11, 1910.

Bill by Charles Vollrath against Magdalena Vollrath for divorce. From a decree for complainant, defendant appeals. Affirmed.

Frank D. Andrus, for appellant.

Henry G. Nicol, for appellee.

STONE, J. The bill for divorce was filed by the husband in this case, charging extreme cruelty on the part of the wife. The specific acts charged were that defendant had on many occasions entertained men at complainant's house in his absence, and that defendant had stated to acquaintances of hers that she had received money from the men so entertained; that defendant had been seen drinking with men in at least two cafés in the city of Detroit, and that she had there been kissed and embraced by men; that, when complainant was sick on one occasion, she had said that she wished he would die, and that his life insurance would be worth more than he was; that defendant had telephoned to complainant's employers on two occasions falsely charging that he was carousing about evenings, getting drunk, and spending money on other women, and that he was at home in the afternoon sleeping, when he should have been at work, the result of such false charges being that complainant lost his positions; that on one occasion when complainant was sick at home the defendant stated to an acquaintance that she was going to put complainant to sleep, and that, if he died, it would appear that he died of heart failure. The defendant answered these charges by a general denial of them. The cause being at issue, the testimony was taken in open court, and a decree was granted to complainant. Defendant appeals.

The complainant's testimony was taken and was corroborated in a greater or less degree by four other witnesses.

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The defendant was sworn, and while she denies many of the charges, and seeks to justify her conduct as to her association with men, we are not impressed with the truthfulness of her explanations, nor with her candor in a number of instances. In addition to her testimony, the defendant examined two witnesses, both of whom were women acquaintances and whose testimony was of the most general character. There was testimony which, if believed by the circuit judge, warranted him in granting a decree to complainant. A careful reading of the record shows that there was a clear preponderance of the affirmative evidence in favor of the complainant. The questions involved are purely questions of fact, the discussion of which would not profit any one. The trial court had the advantage of having seen and heard the witnesses testify. In some matters charged there is a sharp conflict in the testimony which cannot be harmonized. As was said by Justice MOORE in *Donaldson* v. *Donaldson*, 134 Mich. 291 (96 N. W. 449):

"There are many aids possessed by the judge who hears the oral testimony in deciding who of the witnesses are truthful that do not get upon the printed page."

While it is the duty of this court to exercise its independent judgment in such cases, yet where our conclusion accords with that of the circuit judge, and in view of the presumption favoring his conclusion on a question of fact, where he has had the opportunity above referred to, which is denied us on appeal, we think that we should treat the complainant's case as made out by the proofs in this case. *Kirkland* v. *Kirkland*, 111 Mich. 166 (69 N. W. 233); *Bailey* v. *Bailey*, 121 Mich. 236 (80 N. W. 32); *Karreman* v. *Karreman*, 122 Mich. 654 (81 N. W. 576); *Donaldson* v. *Donaldson*, *supra*.

There are no children nor money considerations involved in the case, and we think that the decree below should be affirmed, but without costs.

BIRD, C. J., and OSTRANDER, BROOKE, and BLAIR, JJ., concurred.

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CUMMINGS *v.* DETROIT UNITED RAILWAY.

1. WITNESSES—CROSS-EXAMINATION—PARTIES.
   The latitude to be given in cross-examining the plaintiff is within the discretion of the trial court.

2. CARRIERS — NEGLIGENCE — ALIGHTING FROM CAR — STARTING STREET CAR.
   Under plaintiff's claim that she was thrown and injured by the premature movement of the street car from which she was alighting, the subject of negligence was properly presented to the jury by instructions that if the car started while she was in a position of danger, where the starting of the car would have a natural tendency to throw her, negligence was shown; but if she slipped while the car was at a full stop, she could not recover; that if her version was correct, she was entitled to recover; if the defendant's version was true, she was not entitled to recover.

Error to Wayne; Murfin, J. Submitted October 18, 1910. (Docket No. 83.) Decided November 11, 1910.

Case by Sarah J. Cummings against the Detroit United Railway for personal injuries. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

Clarence P. Milligan, for appellant.

Corliss, Leete & Joslyn (*A. B. Hall*, of counsel), for appellee.

MOORE, J. This is a suit for damages for personal injuries sustained by plaintiff while alighting from a car of the defendant company on Congress street east, in the city of Detroit, after the car had come to a regular passenger stop at the corner of Hastings street, on the evening of January 7, 1909. The case is brought here by writ of error, because of the improper cross-examination of the plaintiff. It is also claimed that the judge did not properly charge the jury.

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There were but two witnesses sworn who knew anything about the accident, the plaintiff and the conductor. They do not agree about what occurred. The plaintiff testified that she boarded the car at Brush street; that she was hurt at half past 8 o'clock in the evening, as she was alighting from the car, because it was started while she was alighting; and that it was four months before she could resume her work. The conductor testified that she got on the car at Randolph street; that the accident occurred at 5 minutes before 11 o'clock at night; that the car was not started, after it was stopped, until after plaintiff was hurt; and that the foot of the plaintiff caught upon something as she was alighting. Part of the cross-examination, to which exceptions are taken, related to where and for whom plaintiff worked, and part of it to an occurrence in which she was a participant, two months after the accident, while she had testified that she could not resume her work for four months. The latitude given to the cross-examination was within the discretion of the judge. See *Ritchie* v. *Stenius*, 73 Mich. 563 (41 N. W. 687); *Georgia* v. *Bond*, 114 Mich. 196 (72 N. W. 232).

It is said the judge did not sufficiently charge the jury upon the question of negligence. The only negligence claimed was the starting of the car while plaintiff was alighting from it. The court charged the jury among other things:

"Well, gentlemen of the jury, as I have had occasion to say to most of you before on this panel, in cases of this description, the primary inquiry on your part is the question as to whether the defendant company was negligent, and then follows the question as to whether or not the plaintiff herself was free from contributory negligence. I don't think, in a case of this description, that it is either essential or of a great deal of assistance to you to define with any great amount of accuracy or detail the meaning of the term 'negligence.' In general, you know what it is. For the purpose of this controversy, I say to you, gentlemen, this: That if this car was started up after it came to a full stop, while the plaintiff was in the position

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of danger, from which position the starting up of the car would have a natural tendency to throw her off the car and injure her, that would be negligence. If, on the other hand, the theory of the defendant is correct, and the plaintiff simply slipped as she was getting off the car, while the car was at a full stop, then there is no negligence on behalf of the company, and she cannot recover. Now, you have heard this short case. You have heard the conflicting claims of the complainant and the defendant. If the plaintiff's version of this accident is true, she is entitled to recover. If the defendant's version of the accident is true, she is not entitled to recover."

We think this covered the subject of negligence as presented by this record very fully.

Judgment is affirmed.

HOOKER, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

CONLEY *v.* SINCLAIR.

1. ABATEMENT AND REVIVAL—EJECTMENT—REAL PROPERTY—DESCENT.

   Upon the death of a defendant in ejectment, the suit abates as to the deceased, whose rights thereupon descend to his heirs, and a new cause of action arises as to them, which must be enforced by instituting a new action under 3 Comp. Laws, § 9723, within a year.

2. SAME—QUIETING TITLE—ACTION PENDING—DEMURRER.

   A bill to quiet title to real property, showing the fact of a previous action in ejectment, to obtain possession of the complainant's land, a judgment for plaintiff that was affirmed on error and the granting of a second trial under the statute, pending which the defendants died, and the action remained not prosecuted or revived against the heirs of either defend-

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ant for upwards of 15 years after their death, is not demurrable on the ground that the action of ejectment is still pending.

Appeal from Huron; Beach, J. Submitted October 10, 1910. (Docket No. 18.) Decided November 11, 1910.

Bill by James Conley against Mary Sinclair and others to quiet title and remove a cloud from lands claimed by and in the possession of complainant. From a decree sustaining a demurrer to the bill, complainant appeals. Reversed.

James H. Hall (*Frank W. Atkinson*, of counsel), for appellants.

Charles D. Thompson (*Elbridge F. Bacon*, of counsel), for appellee.

BLAIR, J. The bill of complaint in this case was filed for the purpose of removing a cloud upon, and quieting the title of complainant to, certain premises in Hume township, Huron county, Mich. Defendants demurred to this bill of complaint for the reason that, prior to the commencement of this suit, an action of ejectment was commenced in the circuit court for the county of Huron by Thomas Sinclair, in his lifetime, against Charles G. Learned, now deceased, and Jonas R. Learned, and alleging that said ejectment suit is now pending in the circuit court for Huron county, and that complainant has in said suit an adequate remedy at law.

It appears from the bill of complaint that the land in question was patented May 1, 1860, by the United States to one Charles N. Babbitt; that subsequently Babbitt gave a mortgage on said land to Frederick S. Ayres, which mortgage was subsequently foreclosed and the property bid in by the mortgagee, and a sheriff's deed executed May 30, 1866, to the said Frederick S. Ayres, mortgagee, conveying the land in question; that on the 5th day of August, 1875, Frederick S. Ayres conveyed said land by

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warranty deed to Charles G. Learned, one of the defendants in the ejectment suit; that on the 23d day of February, 1891, defendant Charles G. Learned departed this life, and on December 4, 1895, the probate court for the county of Huron adjudged that Jonas R. Learned was the sole heir of Charles G. Learned, deceased; that subsequently said Jonas R. Learned and his wife conveyed the land in question to the complainant by warranty deed; that, under these several conveyances, the complainant is now the owner of the original title of this land, and is now in possession of said land, claiming title thereto, and that the complainant and his grantors have been in actual possession of said land, claiming title thereto, for more than 40 years; that Thomas Sinclair, under whom defendants claim, purchased the said land for taxes of 1861 and 1862, and obtained deeds therefor; that he also obtained a quit-claim deed for this land from Charles N. Babbitt, the original locator, which deed was dated April 13, 1880; that November 16, 1881, Thomas Sinclair commenced a suit in ejectment against Charles G. Learned and Jonas R. Learned to recover this land; that Jonas R. Learned was made defendant in the suit as the owner of a tax title on said land for the taxes of 1874; that Jonas R. Learned at the time of the commencement of such suit had no title to or interest in said land except such tax title; that issue was joined in this case, and on January 4, 1883, a judgment was rendered in favor of the defendants; that February 26, 1883, Thomas Sinclair, the plaintiff, sued out a writ of error to review this judgment and on October 4, 1883, the Supreme Court affirmed the judgment of the circuit court, the case being reported in 51 Mich. 335 (16 N. W. 672); that June 7, 1884, on motion of Thomas Sinclair, the plaintiff therein, a new trial under the statute was granted in said cause, and, although more than 25 years have elapsed, no further proceedings have been taken in said cause by said Thomas Sinclair, his heirs or representatives, since that date; that the defendant Charles G. Learned died intestate on the 23d day of February,

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1891, and although more than 18 years have elapsed since the death of said Charles G. Learned, no new action has been brought against the heirs of Charles G. Learned, nor has the ejectment suit been revived against the surviving defendant, Jonas R. Learned; that Thomas Sinclair, the plaintiff in the ejectment suit, died January 24, 1894, and, although more than 15 years have elapsed since his death no proceedings have been taken to revive said suit by his heirs or representatives.

The death of the defendant Charles G. Learned abated the suit as to him, and his rights descended to his sole heir, Jonas R. Learned, against whom a new cause of action arose. *Hoffman* v. *St. Clair Circuit Judge*, 40 Mich. 351. The tax title, which constituted the sole claim of title on the part of Jonas R. Learned at the time the ejectment suit was instituted and down to the time of the death of Charles, was held by this court to be void for reasons which a subsequent trial could not obviate. *Sinclair* v. *Learned*, *supra*. The only title, therefore, which Jonas could rely upon on a second trial of the ejectment suit, was that which he inherited from Charles, and as to this title there was no suit pending; it having abated as above stated.

Upon the abatement of the suit against Charles, under the circumstances of this case, the only remedy of the plaintiff in ejectment was provided by 3 Comp. Laws, § 9723. *McKenzie* v. *A. P. Cook Co.*, 113 Mich. 452 (71 N. W. 868). The sole ground of the demurrer is:

"That said ejectment suit is now pending in the said circuit court for Huron county, and the question of the right to the possession of said property is involved in said ejectment suit, and said complainant has in said suit a complete, full, and adequate remedy at law for the enforcement of his rights in said property."

The demurrer was not well founded, and the order overruling it is affirmed.

BIRD, C. J., and OSTRANDER, BROOKE, and STONE, JJ., concurred.

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HULAN *v.* SHANNON.

SPECIFIC PERFORMANCE—ORAL AGREEMENT—EQUITY—ENJOINING ACTION AT LAW.

Under a bill of complaint for specific performance, averring and supported by proof that complainant entered into an oral agreement to care for her father and live with him, in consideration that he transfer to her at his death the premises on which the parties resided; that he conveyed the premises to the other defendants, in breach of said contract, which was known to them; that they commenced summary proceedings against complainant to recover possession of the property and obtained a judgment of ouster; that complainant was precluded from setting up her equitable defense in the action at law; praying that an injunction issue restraining the enforcement of the judgment, and for general relief, the court should not dismiss the suit at the close of complainant's testimony which was *prima facie* sufficient to entitle her to some form of relief; and the cause, on appeal, should be remanded to permit the defendants to present their proofs.

Appeal from Wayne; Murfin, J. Submitted October 10, 1910. (Docket No. 30.) Decided November 11, 1910.

Bill by Anna S. Hulan against William H. Shannon, Matilda Shannon, and John Hulan for the specific enforcement of an oral agreement to convey land to complainant. From a decree dismissing the bill entered without requiring defendants to introduce evidence to sustain their defense, complainant appeals. Reversed, and remanded for further proofs.

E. A. Fink, for appellant.

Robert M. Brownson and *Denton Guinness*, for appellees.

BLAIR, J. This is an appeal from a decree and pro-

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ceedings in the circuit court for the county of Wayne, in chancery. Complainant, in her bill of complaint, among other things, alleges that, together with her father, one of the defendants, she was in possession of the premises described in said bill of complaint, under and by virtue, and in part performance, of a parol agreement made with her father, whereby she should keep house for her father upon the said premises as long as he should live, and, as compensation for such service, should have the premises as her own at the death of her father, he being an old man upwards of 81 years of age; that under said agreement and in reliance thereon, she had also made certain improvements upon said premises; that, after she had lived with her father for several years under said agreement, and made such improvements, William H. Shannon and Matilda Shannon, his wife, the other defendants in said bill of complaint, with full knowledge of such agreement and the conditions of complainant's occupancy of said premises, induced her father to convey the said premises to them, and at once, upon procuring such conveyance, commenced summary proceedings against her and eventually obtained a judgment for possession of the said premises against her; that said judgment was on direction of the court, because she, in that form of action, was precluded from interposing as a defense thereto her equitable rights and interest in said premises and her right of possession thereof under said parol agreement; that such action of the said defendants was in fraud of her rights; that said judgment was, and is, wholly unjust and inequitable, and if permitted to stand would result in irreparable loss and injury to her, and would deprive her of her rights and interest in said premises without remuneration or compensation therefor. The said bill, among other things, prays that said judgment at law may be vacated and set aside and held for naught; that said deed of conveyance from her father to the said Shannons may also be vacated and set aside and decreed to be null and void; that a temporary injunction might issue restraining

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the defendants from taking out a writ of possession under said judgment and from taking any steps whatever in disturbing the complainant in her possession of said premises; that said injunction upon the hearing be made perpetual; and that complainant's interests and rights of possession of the said premises under her said agreement be made secure and permanent to her, and concluding with a prayer for general relief.

A motion to impanel a jury to try the issues of fact having been granted, the cause accordingly proceeded to hearing before the court and a jury. At the conclusion of complainant's testimony, and when she had rested her case, the trial judge, of his own motion, announced that, in his opinion, the complainant had not made out a case to entitle her to relief, and thereupon he discharged the said jury from further consideration of said case and ordered that a decree dismissing the bill of complaint and dissolving the injunction be taken.

We are of the opinion that, upon this record, as it now stands, the complainant made a case entitling her to some kind of relief. We do not think, however, that we ought to determine the case without affording an opportunity to defendants to present their proofs. The decree will, therefore, be vacated, and the record remanded for further proofs, with the usual solictor's fee and court costs of the appeal to complainant; other costs to abide the final result.

BIRD, C. J., and OSTRANDER, BROOKE and STONE, JJ., concurred.

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PEARCE v. ALWARD.

1. CONTRACTS—ANTICIPATORY BREACH—RESCISSION—SALES.
A contract for the furnishing of 2,500 grapevines to be set out on the farm of defendant, to be cultivated and tended by him for half the fruit, stipulating that the plaintiff should replace any vines which might die within two years, and that at any time within three years defendant might purchase plaintiff's interest in the grapevines at a specified price, does not warrant a demand for interest on the price named in the agreement, and such demand, accompanied by a refusal to replace, at the time stated in the agreement, the vines which might die, unless defendant should pay the interest, constituted a breach of the contract, and justified defendant in rescinding.

2. SAME—COVENANT—WARRANTY.
The agreement to replace dead vines was a dependent and concurrent agreement, not an independent condition going to but part of the consideration.

3. SAME—BREACH—SUBSEQUENT OFFER OF PERFORMANCE.
Offers of the plaintiff to perform the condition, after he had committed a breach thereof, were ineffectual to restore his rights under the contract.

4. SAME—RESCISSION—REPLACING PARTY IN STATU QUO.
That defendant could not place plaintiff *in statu quo* did not affect his remedy of rescission.

Error to Kent; McDonald, J. Submitted October 13, 1910. (Docket No. 53.) Decided November 11, 1910.

Assumpsit in justice's court by Peter D. Pearce against Herbert Alward upon a special contract. Defendant obtained a judgment of no cause of action, from which plaintiff appealed to the circuit court. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Taggart & Taggart, for appellant.

Benn M. Corwin, for appellee.

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BLAIR, J. This action was commenced in justice's court for breach of the conditions of a contract under which defendant received certain grapevines. The contract, made September 5, 1904, provided, among other things, for delivery to defendant at Grand Rapids of 2,500 grapevines; that, in consideration thereof, defendant should receive and properly set them out upon his farm and give them such care and cultivation as was necessary to keep them in proper condition; that the fruit grown and produced therefrom was to belong to and be owned in undivided one-half equal parts to each party. It was further provided that plaintiff should replace any vines dying within two years from the date of the first delivery at Grand Rapids, and that at any time within three years from the date of the first delivery defendant could buy the undivided one-half interest of plaintiff in the vines for $250, and at any time thereafter by paying five cents per vine additional and 6 per cent. interest from the date of delivery. Defendant received and receipted for the vines in good condition at Grand Rapids October 27, 1904. He heeled them in for the winter, set them out the following spring, and took care of them under the contract, and fully performed the contract on his part until March 4, 1907, on which date he received a circular letter from plaintiff. Prior to the receipt of the letter of March 4, 1907, defendant had received several letters demanding interest at 6 per cent. on $250 from the date of the contract. In July, 1906, he received the following letter:

"We have written you several times regarding the interest on your grapevine contract, but as yet have not been favored with the amount. You, as a business man, must realize that the interest is a part of the consideration, and if you fail to take care of your part of the agreement, as regards paying the interest, you have broken your part of the contract and the whole amount becomes due."

The letter of March 4, 1907, was as follows:

"Part of the consideration of our contract with you was that the interest should be paid the first of each October.

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Last October we notified you of the amount of the interest due, but as yet we have not been favored with a remittance. You undoubtedly will want what trees are necessary to replace the dead ones next spring which we expect and intend to send you, but not unless we receive the amount of the interest due $15.00.

"Trusting that you will attend to this at once, we are," etc.

Upon receipt of the letter of March 4, 1907, defendant "considered that the contract was dead," and abandoned further performance of it.

In this suit plaintiff claims his share of the value of the crop of 1908, less cost of picking, and damage to his share of 2,000 vines for failure to properly care for them under the contract; no claim being based on the 500 vines which died. Defendant filed plea of general issue and gave notice of recoupment for value of use of land, care of vines, etc. The circuit judge charged the jury that by demanding interest in the letter of March 4, 1907, as a condition of replacing trees, the plaintiff imposed a burden not contemplated by the contract upon the defendant, and the defendant would have a right to consider the contract as rescinded, and, "the failure of plaintiff to carry out his part of the contract being undisputed, there is no question for you to pass upon," directing a verdict for the defendant.

The questions involved, as stated by counsel for plaintiff, are as follows:

"(1) Whether, in view of plaintiff's repeated offers to replace any dead trees and defendant's failure to ever count (until immediately prior to the suit) the vines that had died, or to make demand upon plaintiff to replace or accept replacement when offered, plaintiff had defaulted in a condition of the contract.

"(2) Effect of breach of a subsequent independent condition or agreement to be performed in the future and going to but part of the consideration. Whether it deprives plaintiff of all remedy or goes only to reduce damages.

"(3) Defendant's right to rescind without putting plaintiff *in statu quo* and without notification.

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"(4) Admissibility of evidence of the wholesale price of the vines for cash when the price was specifically fixed by contract entered into and not for cash and with special warranty."

1. If the letter of March 4, 1907, authorized the defendant to treat the contract as rescinded by the plaintiff, any offer to replace the vines made afterwards would be ineffective. Both parties treated the contract as requiring delivery in the spring of 1907, the time for planting the vines; at least, plaintiff recognized the right of defendant to demand them at that time and even long afterward. While the right to demand the vines was still open, plaintiff wrote the letter of March 4th, which obviated the necessity for any further demand under defendant's construction of its effect. We think there was a clear breach of the contract on plaintiff's part.

2. This is the important question in the case. Plaintiff contends that the agreement to replace constituted an independent agreement analogous to a warranty, going to only part of the consideration, which did not authorize rescission, but only the recoupment of damages. We are unable to take this view of the agreement. The number of vines was an essential element or feature of the contract, affecting the amount of land to be prepared for them, the amount of labor, and the profits to be derived. The parties contemplated working a vineyard containing 2,500 vines, not one containing 2,000 vines, or 1,500 or 1,000 vines, and, if plaintiff had tendered 2,000 vines at the outset, defendant would have been entitled to refuse to receive them. Defendant was bound to plant, cultivate, and care for the vines, and manifestly he could not do this until the vines were furnished, so that the furnishing of the vines at the beginning and the keeping of the delivery good by replacing the dead vines after the expiration of two years must precede the performance of the agreement on the defendant's part. It was admitted by plaintiff that defendant had performed the contract on his part in every particular up to the time of receiving the letter of March

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4, 1907, and based his refusal to proceed further with it upon plaintiff's unlawful demand of interest in that letter. We are of the opinion that the agreement to replace was a dependent and concurrent agreement, and that the unjustifiable refusal of the plaintiff to perform his part of the agreement, and which, indeed, was substantially the only agreement on his part, authorized the defendant to treat the contract as rescinded by the plaintiff.

3. Plaintiff had a duplicate copy of the contract. He had put it on record. The plaintiff's claim of interest was wholly unsupported by the agreement, as well as his claim that defendant had bought the vines outright. Defendant had a right to believe that plaintiff fully understood his contract, and it is difficult to understand how he could have misunderstood it. The defendant was without fault, and the plaintiff was wholly at fault in breaking the contract. He first rescinded the contract, knowing that defendant could not place him *in statu quo*, and must suffer the consequences of his unjustifiable act.

The trial judge did not err in instructing a verdict for defendant, and the judgment is affirmed.

BIRD, C. J., and OSTRANDER, BROOKE, and STONE, JJ., concurred.

CUNNINGHAM v. HAWKINS.

1. BONDS—CONTRACTS—EXECUTION—SIGNATURE.
A bond signed on the back by principal and surety, not in the usual place for signing, and after the justification, is valid.

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2. SAME—PLEADING AND PRACTICE — EXECUTION OF WRITTEN INSTRUMENT.

The failure of the defendants to deny, under oath, the execution of a bond counted on in the declaration, admits its legal execution.

3. SAME—GENERAL ISSUE—NOTICE OF DEFENSE.

Averments contained in a notice of defense, in an action on a bond, stating that the bond was given to secure the purchase price of certain goods, and that the principal sent in orders for goods for which the suit was brought, were admissions that the instrument was given to secure the price of goods thereafter to be purchased. (Circuit Court Rule 7 *e*.)

4. SAME—CONSTRUCTION—SALES.

A bond to pay all money due for fencing and supplies within 60 days from receipt, created an obligation of the surety to pay for goods subsequently purchased by the principal in the bond.

Error to Grand Traverse; Mayne, J. Submitted October 11, 1910. (Docket No. 41.) Decided November 11, 1910.

Assumpsit by Francis C. Cunningham, Charles Christianson, Ellsworth S. Ellis and William M. Thomas, copartners as the Nickel Plate Fence Company, against Otis Hawkins and Jane Hawkins on a bond. A judgment for defendants on a verdict directed by the court is reviewed by plaintiffs on writ of error. Reversed.

Smurthwaite & Alway, for appellants.

John W. Patchin, for appellees.

BLAIR, J. This is an action upon a written instrument set out in full in the declaration as follows:

"For that, whereas, the defendant Otis Hawkins, heretofore, to wit, April 10, 1908, desired to act as agent for the Nickel Plate Fence Company of Manistee, Mich., a corporation organized under the laws of this State, and to that end purchased of and from the said Nickel Plate Fence Company such of its fencing and supplies as he would need or require for sale or use, at wholesale rates,

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and on credit for short periods on each order for such products sent in to said corporation by him, and the said corporation declined to extend such credit to said Otis Hawkins unless the payment for such products so ordered by and delivered to him was secured by bond or otherwise. And thereupon, the said defendants on, to wit, the 10th day of April, A. D. 1908, did make, execute, and deliver to the said Nickel Plate Fence Company, a corporation as aforesaid, their bond or writing obligatory, in the words and figures following, namely:

"'Know all men by these presents that Otis Hawkins and Jane E. Hawkins are held and firmly bound unto the Nickel Plate Fence Co., a corporation, in the sum of five hundred dollars lawful money of the United States of America, to be paid to the said Nickel Plate Fence Co., a corporation, or to its certain attorney, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, and each and every one of them, firmly by these presents.

"'Sealed with our seals, dated the 10th day of April one thousand nine hundred and eight.

"'The condition of this obligation is such, that if the said Otis Hawkins shall pay the said Nickel Plate Fence Company any and all money due said company for fencing and supplies, within sixty days from receipts of said fencing and supplies, then this bond shall become null and void, otherwise to remain in full force and effect.

"'In the presence of

"'JULIUS CORE. [L. S.]

"'M. G. ELLIS. [L. S.]

"'STATE OF MICHIGAN, } ss.:
"'County of Leelanau. }

"'Jane E. Hawkins, surety on the within bond of Otis Hawkins, being duly sworn, deposes and says that she is worth in the aggregate in unencumbered property, not exempt from execution under the laws of this State, the penal sum of this bond, after payment of all just debts, claims and liabilities, to wit.

"'The said Jane E. Hawkins says she is worth $500.00 and upwards.

"'The said.....says he is worth $.....

"'JANE E. HAWKINS.

"'OTIS HAWKINS.

"'Subscribed and sworn before me this 10th day of April, 1908.

"'JULIUS E. CORE, Justice of the Peace.

"'My commission expires on the 4th day of July, 1909.'"

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To this declaration defendants pleaded the general issue with notice of recoupment. The notice of recoupment, among other things, contained the following:

"That said defendant Otis Hawkins, relying on the promises, undertakings, and agreements of said corporation, went to work under the same, to wit, in the month of August, 1907, and faithfully worked for said corporation for a period of eight months or thereabouts, taking large orders for said corporation under said agreement. That during that time and, to wit, in the month of April, 1908, said defendant Otis Hawkins sent in to said corporation his orders for a large portion of the goods, wares, and merchandise for the recovery of the purchase price of which this suit is brought. * * * That at the time of the assignment of the property of said corporation to said plaintiffs, and of the assignment of the claims of the said corporation against defendant Otis Hawkins to the plaintiffs, the said defendant Otis Hawkins was entitled to recoup against the claims of the said corporation the said several sums hereinbefore set forth, which were then and there due from said corporation to the said defendant, Otis Hawkins, as hereinbefore specified and that the said defendant Otis Hawkins is still entitled to recoup his said claims against the claims of the plaintiffs in this case. That the said bond, being given to secure the purchase price of said goods, is subject to be recouped against by said claims of said defendant Otis Hawkins, and the said defendants hereby give notice that on the trial of said cause they will recoup," etc.

After plaintiffs had put in their evidence, the trial judge directed a verdict for the following reasons:

"As between Otis Hawkins and the Nickel Plate Fence Co., I think the case that I read to counsel, *Fowler* v. *Hoffman*, 31 Mich. 215, would govern that the term 'due' would mean, not alone matters then due, presently due, but that thereafter might become due. I think, gentlemen—I have some doubt about this—I shall make the record just as short as I can for the Supreme Court. I shall hold that the surety is not bound under this bond. That this does not create a liability for subsequent dealings between the parties as running accounts such as has been proved in this case. That under the entire testimony and objections made there to the form of the bond, its method of execution, that the bond is so defective that it

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cannot be considered as a binding obligation upon Jane E. Hawkins. That will cover all the questions and the case can be taken up, made up upon this bond, and taken up."

We are of the opinion that the court erred in directing a verdict for defendants. The law deals with the substance of things, and not with their ephemeral surroundings, and the fact that the obligors in the bond indorsed it on the back and under the form of a property justification does not alter the essential character of their undertaking. Furthermore, the failure of the defendants to deny the execution of the bond under oath admitted a legal execution of the bond and cast upon them whatever liability the terms of the bond imposed. The statements of the notice under the general issue above quoted constituted admissions on the part of both defendants that the bond was given to secure the purchase price of goods thereafter to become due. Circuit Court Rule 7*e*; *Comstock* v. *Taggart*, 156 Mich. 47 (120 N. W. 29). Jane E. Hawkins is the mother of Otis Hawkins.

Independent of admissions, we think that a fair construction of the terms of the bond leads to the same result. *Fowler* v. *Hoffman*, *supra*.

The judgment is reversed, and a new trial granted.

BIRD, C. J., and OSTRANDER, BROOKE, and STONE, JJ., concurred.

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JOHNSON *v.* MORRISON.

1. FRAUDS, STATUTE OF—PART PAYMENT—REQUIREMENTS.
   A sale of personal property, of the value of $50 or more, is invalid unless there is a delivery, a part payment, or a writing signed by the party to be charged. 3 Comp. Laws, § 9516.
2. SAME—PAYMENT.
   Part payment may be made in money or anything of value.
3. SAME—LOGS AND LOGGING—SALES.
   But delivering to the owner of logs, an order on the clerks of the purchaser, for the payment of a portion of the price, did not constitute a sufficient part payment to bind the contract, where the owner, a Finn, was unable to read it, took it to an interpreter, and, on learning the contents, returned it to the buyer, and sold the logs to plaintiff.

Error to Houghton; Streeter, J. Submitted October 17, 1910. (Docket No. 66.) Decided November 11, 1910.

Trover and case by Andrew Johnson against Charles J. Morrison for the conversion of logs. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

P. H. O'Brien, for appellant.

Allen F. Rees, for appellee.

MCALVAY, J. This is an action in trover brought by plaintiff against defendant's decedent for the value of certain saw logs claimed to have been wrongfully converted by him. The trial resulted in a verdict instructed by the court for defendant. Plaintiff has removed the case to this court for review, asking a reversal of the judgment entered in accordance with such verdict, alleging error,

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upon such action of the court. The logs in question were originally the property of a man named Matt Sturback, and were by him cut and hauled to the railroad, at or near Arnheim, in Baraga county. Sturback is a Finn who cannot read, write, or speak the English language, and all communications with him by persons unable to speak Finnish must be by interpreter. The plaintiff and defendant both claim title to this property by purchase from Sturback.

On or about April 11, 1906, Sturback, with his stepson as interpreter, went to Ewen McDonald, who was buying logs at Arnheim as agent for defendant's decedent, and entered into negotiations with him to sell the logs in question. After looking over the logs together, McDonald made an offer of a price per foot, conditioned upon Sturback loading the logs, and made a rough estimate of the quantity of the logs. Sturback insists that he refused to agree to load the logs upon the cars at his own expense. McDonald would not agree to stand the expense of loading the logs and referred him to Mr. Morrison. It was understood that an immediate payment was to be made to apply on the purchase. Sturback says that he asked for $275, which was refused by McDonald, who offered a payment of $260. McDonald testifies that he offered $250. McDonald then went to his house and wrote the following letter to his employer:

"ARNHEIM, BARAGA COUNTY, MICH.
"April 11, 1906.

"Mr. J. S. MORRISON,
"*Dear Sir:*

"I bought the logs from Matt Sturback, Kinnenin's neighbor, at 7c per ft. from 8 ft. to 18 ft., from 18 to 24, 8c, from 24 up, 9c a foot on the car. You may explain to him about the loading part too. He is wanting money now. I gave rough estimate on the logs, but I kept back enough to load the logs if he fails to do it himself and more too. So as if you are agreed with the way I made the bargain you need not be afraid of giving him the amount which I give you here I figured up myself. I think it

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safe enough to give him two hundred and thirty dollars, $230.

"Yours truly,
"EWEN MCDONALD."

He inclosed it with another letter to Morrison, on other business, in an envelope which, we infer from the testimony, was sealed, and gave it to Sturback, who delivered it to Morrison. The contents of the second letter are not given because not material. Some conversation was had with Sturback about the purchasing and loading of the logs; the stepson acting as interpreter. There is a dispute as to what was said, or whether an agreement was entered into. Testimony is in the record tending to show that Sturback refused to load the logs, and on the part of defendant that Morrison agreed to load them. Morrison took one of the letters and wrote on it to the clerks in his office the following order:

"April 11, 1907.

"Mr. ROBERT M. ALLEN or
"Miss JEAN ALLEN:

"You will please pay the bearer, Matt Sturback, two hundred and thirty ($230.00) dollars, on account of logs.
"J. S. MORRISON."

He handed this to Sturback, who took the letters and order to Hancock to Charles Ossila (who acted as interpreter on the trial) to translate for him. When he learned the contents of these papers, he at once returned them to Mr. McDonald and informed him that the transaction was ended. McDonald sent the papers to Morrison. Later Mr. Morrison sent a letter to Sturback as follows:

"CALUMET, MICH., April 18, 1907.

"Mr. MATT STURBACK,
"Jacobsville, Mich.

"*Dear Sir:* I am going to take away those logs I bought from you at Arnheim. We will begin to load them on cars very soon. We will measure, count and scale the logs as we load them. If you would like to have a man there to scale, or see the logs scaled send him at once.
"Yours truly,
"J. S. MORRISON."

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As soon as he received this letter, he procured an interpreter, and with him went to Morrison and handed him the letter, telling him, through the interpreter who translated for both of them, to leave the logs there and not to load them. This interpreter testifies that Morrison then asked him if he would sell the logs to him if he would give him the same price as Johnson offered; that Sturback answered that he could not; that he had already sold them to Johnson. Afterwards Morrison loaded these logs, removed them by rail, and sold them to the Calumet & Hecla Company. When plaintiff bought the logs from Sturback he paid $275, and has since paid him enough to make $660. The court directed a verdict for defendant, and the foregoing statement of facts is therefore made with reference to the evidence offered by plaintiff, under the rule that in such cases plaintiff's evidence must be taken as true.

The claim of plaintiff is that the court was in error in holding that the minds of Sturback and Morrison met at time the letter from McDonald was presented and the matter was talked over and Morrison wrote the order to his clerks, and that the order to Morrison's clerks received by Sturback amounted to a part payment for the logs.

To make a sale of personal property of the value of $50 or more valid, one of the three requirements of the statute of frauds must be fulfilled: There must be a delivery, a part payment, or a writing signed by the party to be charged. We agree with the contention of plaintiff that no contract was made with McDonald, and therefore a delivery must have been made to Morrison. The record does not show, nor does counsel for defendant claim, that a delivery was made to him; nor does it appear that any writing was signed by Sturback.

Was part payment made by this order to Morrison's clerks? If it was not, no valid sale was made to Morrison, and by the sale subsequently made by Sturback to the plantiff these logs became plantiff's property. Part payment may be made in money or in anything of value.

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Whether this order was a thing of value must be determined from the instrument itself. It is not a check, nor is it a promise to pay. If it may be treated as of equal binding force as a check—which we do not determine—we find that the authorities go no further than to say that "a check given by the buyer, when it is accepted in payment and is actually paid, satisfies the statutes." 29 Am. & Eng. Enc. Law (2d Ed.), p. 970, and authorities cited. Except the taking of the paper by Sturback, there is no proof that it was accepted in payment and the inference from what Sturback immediately did is that it was taken to ascertain what these writings were. The evidence is uncontradicted that he went at once to one who could translate for him, and, ascertaining what they were, immediately returned them to Mr. McDonald, the log buyer, stating that he would have nothing further to do with the transaction. The order was never paid. The check cases therefore do not cover this case.

There is some dispute between counsel as to whether the order in question was written by Morrison on the letter McDonald wrote for Sturback to take to him, or on the other letter which McDonald inclosed with it in the same envelope. The record is somewhat confusing, but it was probably written on the other letter. It is of no consequence, for the reason that both of these letters were in the same envelope. They were delivered to Morrison at the same time. He wrote the order on one of them at the railroad siding or switch, then put both of them back into the envelope, and gave them to Sturback. McDonald testifies that both papers were sent by him to Morrison, and both were produced in court by defendant. What Sturback did with these papers in returning them to McDonald, and not the words he spoke in the Finnish language, indicates his intention. Notice of what Sturback had done was thus brought home to Morrison at the time, and also later by Sturback when he returned the registered letter to Morrison telling him not to move the logs and that he had sold them to plaintiff. Our conclusion is that there was

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no acceptance of this order by Sturback, and no part payment was made upon this property, and therefore that no valid contract of sale was made. The court was in error in instructing a verdict for defendant.

Other questions presented require, under the circumstances, no discussion.

The judgment is reversed, and a new trial ordered.

HOOKER, MOORE, BROOKE, and BLAIR, JJ., concurred.

RILEY v. DETROIT UNITED RAILWAY.

1. APPEAL AND ERROR—RETURN TO WRIT—TIME.
   The court will not dismiss a writ of error for failure of the clerk to make the return in time, on a motion filed after the return has been actually made.

2. SAME—TIME OF ISSUANCE—STATUTES.
   The Supreme Court acquires no jurisdiction of a cause in which a writ of error issues more than 18 months after judgment in the court below.

Case by Etta Riley against the Detroit United Railway. Judgment for defendant and plaintiff brings error: On motion to dismiss the writ of error. Submitted October 18, 1910. (Calendar No. 24,178.) Granted November 11, 1910.

Brennan Donnelly & Van De Mark, for the motion.

Browse T. Prentis, contra.

BIRD, C. J. The defendant has filed a motion in this

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cause to dismiss the writ of error issued therein for the reasons:

First, that the return to the writ was not filed until after the return day; *second*, the writ was not issued within one year after the rendition of the judgment.

The affidavit filed in support of the motion shows that a judgment was rendered for the defendant in the Wayne circuit court on the 16th day of February, 1909, and that a writ of error was not issued out of this court until August 17, 1910. The writ was made returnable on September 25th, but the return thereto was not filed until October 5, 1910.

1. While the record shows that the return to the writ was not filed for 10 days after the return day, it also shows that the motion to dismiss was not made for 10 days after the return was filed. Under these circumstances, the court will not dismiss the writ. *Babcock* v. *Twist*, 16 Mich. 281.

2. The statute prescribing the time in which writs of error may issue is as follows:

"All writs of error upon any judgment or final determination, rendered in any cause, in any court of law and of record in this State, shall be brought within one year after the rendering of such judgment or final determination made and not after, except in cases specified in the next two sections: *Provided*, the time in which writs of error may be taken out may be extended not exceeding six months by the Supreme Court or by one of the Supreme Court justices at chambers, when any party has been prevented from taking out the same by circumstances not under his control. Such extension shall only be made on special motion and after a proper showing." 3 Comp. Laws, § 10492.

It will be noted that under the foregoing provision the whole time allowed by the statute is one year and six months. This entire period had elapsed before the writ was applied for. Plaintiff's counsel insists that defendant has waived its right to have the case dismissed, because it did not move more promptly to have the writ dismissed,

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after notice to it of the issuance thereof. We cannot agree with counsel in this contention. The statute fixes the time in which the writ shall issue, and provides that it shall not issue after that time (save in certain specified cases which have no application here). We think the question is one of jurisdiction under the statute, and anything that defendant might do, or fail to do, would not confer jurisdiction on this court after the statutory time had expired. *Teller* v. *Willis*, 12 Mich. 268, 384; *People* v. *Van Wagner*, 51 Mich. 171 (16 N. W. 326).

We feel compelled to grant the motion to dismiss the writ, but without costs to either party.

OSTRANDER, BROOKE, BLAIR, and STONE, JJ., concurred.

PEOPLE *v.* PARSONS.

1. CRIMINAL LAW — JUSTICES OF THE PEACE — ADJOURNMENTS — CONSENT OF RESPONDENT.

   Although 1 Comp. Laws, § 1021, requires, in criminal prosecutions before justices of the peace, that the cause be tried within 30 days, in order that the accused may have a speedy trial, an adjournment for more than 30 days, on the application of the respondent and upon a sufficient showing, does not oust the justice of jurisdiction, whether or not the prosecuting attorney consents.

2. SAME—CRIMINAL SLANDER—WORDS IMPUTING WANT OF CHASTITY.

   To charge that the employer of an unmarried woman got himself into a scrape by borrowing instruments of a physician and committing an abortion on her, imputes a want of chastity to her.

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3. SAME—INFORMATION—AVERMENTS.

A statement of such language in the information sufficiently charges an offense, without negativing the possibility that she might have been recently divorced, and the averment that she was an unmarried woman was sufficient to negative the idea that she became lawfully pregnant. 3 Comp. Laws, § 11762.

4. SAME—TRIAL—FALSITY OF SLANDER.

It was immaterial that no evidence of the falsity of the slanderous words was introduced on the first trial before a justice's jury, which disagreed, where the prosecutor offered sufficient evidence of the untruth of the words upon a second trial before the justice without a jury.

5. SAME—JUSTICES OF THE PEACE—DOCKET ENTRIES.

Irregularities in the docket entries of a justice of the peace, in a prosecution for slander, not affecting the merits of the case and consisting of an omission to note an adjournment in the justice's docket, to enter the plea of the accused, and to enter the offense charged by the complaint, do not justify discharging the respondent on certiorari, where the defects are supplied by averments of the application for certiorari and the respondent had a fair trial and was justly convicted.

6. SAME—SENTENCE.

A judgment of the justice that respondent "should pay a fine of $50 and costs," sufficiently requires payment forthwith.

Error to Eaton; Smith, J. Submitted October 21, 1910. (Docket No. 150.) Decided November 11, 1910. Rehearing denied February 1, 1911.

Romeyn C. Parsons was convicted before a justice of the peace of criminal slander. The conviction was affirmed on certiorari to the circuit court. Affirmed.

Lawton T. Hemans (*Tuttle, McArthur & Dunnebacke*, of counsel), for appellant.

R. R. McPeek, Prosecuting Attorney, and *Franz C. Kuhn*, Attorney General, for the people.

BLAIR, J. On February 12, 1909, complaint was made by a young woman before a justice of the peace charging respondent with imputing to her a want of chastity. A warrant was issued, respondent brought before the mag-

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istrate, an examination demanded, and the cause adjourned to March 13th; the justice treating the case as not within his jurisdiction to try. On March 13th the respondent was discharged upon the complaint of February 12, 1909, and a new complaint and warrant was issued and the respondent brought before the court, whereupon an adjournment of the case was taken to April 1, 1909. Respondent was required to, and did, furnish bail in the sum of $1,000 for his subsequent appearance. On April 1, 1909, respondent appeared in person and by attorney, and made and filed a written motion asking an adjournment of the case to enable him to procure witnesses and to obtain the assistance of counsel to try the case. The case was thereupon adjourned to April 2d. On April 2, 1909, respondent made and filed a further showing for a continuance, and in his second motion asked:

"That the above-entitled cause may be adjourned for a period of four days or thereabouts, or such other time as shall enable him to prepare for the defense of said cause, for the reasons set forth in the affidavit hereto annexed."

The case was adjourned to April 29th; respondent and his counsel stating in response to an inquiry from the justice that such adjournment was satisfactory to them. The case was tried by a jury, who finally disagreed. Before the jury was sworn, respondent filed a motion asking for his discharge, upon numerous grounds, among which were that the complaint and warrant charged no offense known to the laws of this State, and that the court had lost jurisdiction to proceed with the case because the case had been illegally adjourned. This motion was overruled.

At the beginning of the trial, respondent's counsel objected to the introduction of evidence in the case for the reason that the court had no jurisdiction to proceed with the trial because of such illegal adjournment. At the conclusion of the trial, a motion to discharge respondent for the reason that no offense was charged against him, and that the court had lost jurisdiction by reason of the

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illegal adjournment, was made and overruled. The jury having disagreed upon the first trial, the respondent again appeared in court on April 30, 1909, and filed another motion asking for his discharge upon the grounds, among others, that the complaint and warrant charged no offense and that the court had lost jurisdiction by reason of such illegal adjournment. Respondent was thereupon again placed upon trial, whereupon he filed a written waiver of jury, and asked that the case be tried before the justice. The case was thereupon tried before the court, the respondent submitting no proofs in his defense; whereupon the court found respondent guilty, and adjourned the case to May 5, 1909, at which time respondent was required to appear for sentence. On May 5, 1909, respondent appeared, and sentence was imposed upon him by the justice in the following language:

"The court did thereupon adjudge and determine that the said respondent should pay a fine of $50 and costs of prosecution, taxed at $24.50."

The cause was thereupon removed to the circuit court for the county of Eaton, by certiorari. The circuit judge affirmed the judgment of the justice and entered an order, mandatory in form, that the respondent pay to the clerk of the circuit court for the county of Eaton the sum specified in the sentence of the court below, namely, a fine of $50 and costs of prosecution, taxed at $24.50. The circuit judge having affirmed the judgment of the justice, the case was brought to this court upon writ of error.

Respondent asks that the judgment be reversed, and that he be discharged, for the reasons:

(1) That the justice lost jurisdiction in adjourning the case more than 30 days.

(2) The complaint and warrant charge no offense known to the law.

(3) That there was no evidence submitted upon either the first or second trials before the justice that the things alleged to have been said by respondent were false in fact.

(4) The insufficiency of the justice's docket.

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(5) The sentence imposed is uncertain and indefinite.

1. Section 1021, 1 Comp. Laws, provides as follows:

"On the return of the warrant, with the accused, the said justice shall proceed to hear, try and determine the cause within one week after the return of the same, unless the absence of witnesses from the county without the fault or connivance of the party seeking such continuance shall render such continuance necessary, or unless the sickness of witnesses or of the accused shall render a continuance of such cause necessary; in which case it shall and may be competent for the justice to adjourn or continue the same for such time as may be necessary to secure the ends of justice, not exceeding thirty days in all: *Provided*, that in case of the absence of witnesses the party seeking to obtain a continuance for that cause shall further show to the satisfaction of the court that he has used due diligence to obtain the testimony of such witness."

A strict construction of this section would require that the accused be tried within one week unless one of the grounds for continuance specified in the statute were shown, and the case could no more be continued beyond one week without the statutory showing than it could be continued beyond 30 days in all with the statutory showing. Nevertheless, this court held, in *People* v. *Shufelt*, 61 Mich. 237 (28 N. W. 79), that the case might be continued beyond the week upon a showing of the sickness of the prosecuting attorney, which is not a statutory ground for continuance. In *People* v. *Hux*, 68 Mich. 477 (36 N. W. 229), it was held that an adjournment for more than one week, upon the application of the respondent, and with the consent of the prosecuting attorney, did not oust the justice of jurisdiction. To the same effect, see *People* v. *Weeks*, 99 Mich. 86 (57 N. W. 1091). It is said, *obiter*, in *People* v. *Hux*, *supra*:

"The respondent will not be heard to complain where the adjournment is for a less period than 30 days, for what could have been done on motion and showing can always be done by consent."

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See, also, *Troy* v. *Rodgers*, 162 Mich. 28 (127 N. W. 31). The decisions cited show clearly that this court has not applied a strict construction to this statute, but has construed it to authorize adjournments, *against the objection of the accused*, where such adjournments, like those specified in the statute, were necessary to promote the interests of justice. This statute was enacted to secure to accused persons that right to a speedy trial which is guaranteed to them by the Constitution, and it would be a harsh construction which should turn this shield for their protection into a sword for their destruction. We are satisfied that a proper construction of this section permits of adjournments beyond 30 days, where such adjournments are granted upon application of the accused upon a sufficient showing, whether with or without the consent of the prosecuting attorney. See, for a discussion of this subject, the note to *In re Begerow*, 133 Cal. 349 (65 Pac. 828, 85 Am. St. Rep. 187).

2. The complaint charges that respondent imputed a want of chastity to the complaining witness, an unmarried woman, by charging that her employer had got himself into a nice scrape; that he had borrowed a doctor's instruments and committed abortion on her; and that she demanded $15,000, and his wife had kicked him out of doors, etc. A statement of the charge obviates the necessity for discussion. The language is to be construed as those to whom it was spoken would naturally understand it, and clearly imputed a want of chastity. We are not inclined to indulge in sophistical conjectures that the complaining witness might have been a recently divorced woman. The averment that she was an unmarried woman negatived the idea that she had become lawfully pregnant.

3. What was proved on the trial before the jury is of no consequence, since the jury disagreed, and on the trial before the justice there was proof of the falsity of the charge by the testimony of the complaining witness to that effect.

4. The docket is quite irregular, and some of the things

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which should have been entered there were not, in fact, recorded until after the affidavit for the writ was served. It appears, however, from the affidavit for the writ of certiorari and from the return, that the proceedings required by law to authorize a conviction were actually had, and that respondent was regularly and legally convicted; the only flaw in the proceedings is the failure of the magistrate to properly minute all of the proceedings in his docket. The question before us then is: Shall a person who has been regularly convicted of crime be discharged and justice be cheated of her dues because, forsooth, the magistrate has failed in some particulars to properly record the details of the proceedings? Although the docket showed no plea by respondent, it is clear that there was a plea of not guilty, and he went to trial before the jury and the justice without objection on this ground. In the same way, one of the adjournments was not noted, but it was actually ordered, and respondent appeared on the adjourned day. Also, the docket described the offense by referring to the complaint, when, perhaps, it should have been entered briefly upon the docket. The omissions and defects complained of in no way affected the merits of the case, nor did they interfere in any way with the defendant's rights. He had a fair and impartial trial, and the evidence was conclusive of his guilt. Under such circumstances, we regard it as our duty, enjoined by statute, "to give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imperfections or defects in the proceedings before the justice which did not affect the merits."

5. We think the judgment was sufficient and required the payment of the fine and costs forthwith. There was no substantial difference between this and the judgment entered in the circuit court.

The judgment is affirmed.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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PEOPLE *v.* FREELMAME.

CRIMINAL LAW—BURGLARY—BURGLARS' TOOLS.

In a prosecution for burglary, evidence was properly admitted showing that burglars' tools and implements were found on three other persons with whom respondent was arrested on the night of the alleged crime, of which the three had been previously convicted.

Error to Hillsdale; Chester, J. Submitted October 20, 1910. (Docket No. 121.) Decided November 11, 1910.

James Freelmame was convicted of the crime of burglary. Affirmed.

Frank M. Hall and *G. F. Lewis*, for appellant.

Paul W. Chase, Prosecuting Attorney, and *John E. Bird*, Attorney General, for the people.

MOORE, J. An information was filed charging the respondent, James E. Burke, Charles Hadley, and William Miley with the offense of burglary. The three last-named respondents were tried together, and convicted. This case was appealed to this court, and the conviction affirmed. The case is reported in *People* v. *Burke*, 161 Mich. 397 (126 N. W. 446). A reference to the opinion in that case will save the necessity of going over the facts there stated again.

This respondent elected to have a separate trial. He was convicted. Error is assigned upon the admission of testimony as to the purpose for which certain tools which were found upon the persons of the other respondents were used. Under the facts disclosed by the record, we think the testimony admissible. See *People* v. *Cleveland*, 107 Mich. 367 (65 N. W. 216). A careful exami-

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nation of the record does not disclose any question other or different than those passed upon in *People* v. *Burke*, *supra*. That case is controlling as to this case.

The conviction is affirmed.

HOOKER, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

BROWN *v.* BROWN.

1. EQUITY—PRACTICE—AMENDING DECREE.
   After the entry of a final decree in a suit for specific performance, and after discovering that the description of land affected by the proceedings was incorrect, a second order permitting the complainant to open the decree and insert an amended description as it might be determined by a survey, obviates the objection that the final order contained an incorrect description.
2. SPECIFIC PERFORMANCE—ORAL CONTRACTS.
   The decree of the circuit court granting specific performance of a contract, not in writing, to convey real property, is sustained as warranted by sufficient although conflicting evidence.

Appeal from Huron; Beach, J. Submitted October 20, 1910. (Docket No. 90.) Decided November 11, 1910.

Bill by Matilda C. Brown against Harriet Brown and Levi Brown for specific performance. From a decree for complainant defendants appeal. Affirmed.

John F. Murphy and *Charles D. Thompson*, for complainant.

George W. Bates and *George M. Clark*, for defendants.

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MOORE, J. The bill is filed by Matilda C. Brown, widow and administratrix of the estate of Harvey H. Brown, deceased, for the specific performance of an oral contract alleged to have been made by Levi Brown and Harriet Brown, his wife, with their late son, Harvey H. Brown, just prior to his marriage, October 12, 1897. By this contract it is alleged that they were to sell to him a certain house and lot in Harbor Beach, Mich., and that under it he took possession of the place as his homestead, paid the consideration, made various improvements and repairs thereon, and remained in possession of same until his death by drowning, April 23, 1907.

On the part of defendants it is claimed that no such contract was ever made with the said Harvey H. Brown; that at the date of the alleged contract Levi Brown had no interest in the premises, which were then owned solely by his wife, Harriet Brown; that she never made any such contract with Harvey Brown, but there was an understanding between the said Harvey H. Brown and his mother that at the time of his marriage, October 12, 1897, he would be allowed to occupy the premises in question as his homestead without rent; and that, if he made any improvements or repairs, the same were to be made at his expense and left there, if he should afterwards leave the place; but that at no time did Harvey Brown pay Harriet Brown or Levi Brown any money for these premises. The court below rendered a decree in favor of the complainant for specific performance as prayed in the bill of complaint. The case is brought here by appeal.

A preliminary question presents itself at the outset. It is urged on the part of the appellants that the premises are not sufficiently described in the bill of complaint to warrant a decree, and the decree is fatal because of the description therein. There was a full hearing in the court below upon the merits. Subsequent to the making of the first decree the following order was entered:

"At a session of said court held at the courthouse in

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the city of Bad Axe upon the 5th day of April, A. D. 1910.

"Present: Honorable Watson Beach, Circuit Judge.

"It being made to appear to the court that the recital of the description of the property awarded to the complainants in this cause, made and entered, is defective and cannot be applied to the property, it is ordered, adjudged, and decreed that the said decree be opened so far as the description aforesaid is concerned, and that Paul Praschan make a survey of the proper boundaries of said homestead lot, and report such survey and proper description to this court, that the court may amend its decree in that respect. This decree shall in no wise affect the proceedings of defendants towards settling a case for review in the Supreme Court. When the amended decree is made, it may be treated as of the date of the former decree, so far as appeal is concerned."

After this order was made, the appellants proceeded to perfect their appeal. The record and full briefs are here, and the case has been argued at length orally. We do not think the appellants can be heard to say there cannot now be made a final disposition of the case.

The hearing was had in open court. The oral testimony was very conflicting. On the part of the complainant, testimony was produced to the effect that both of defendants stated that the son, Harvey Brown, had purchased the premises for the sum of $250, and had made full payment for it. The judge of probate testified that, after the death of Harvey Brown—

"I went over to Harbor Beach in May, 1907, to get a deed from the old lady. I supposed the property belonged to Levi. I found that the property was all in the old lady, Harriet Brown. She said Harvey had paid for the place, and he ought to have a deed; 'but I will never sign another deed.' The place was the little homestead."

All of these witnesses were contradicted by the defendants. The case presents a striking illustration of the advantage, in determining the credibility of witnesses, of hearing their testimony and of seeing them while they are giving it.

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There is testimony that, from the time Harvey Brown and his young wife moved upon the premises in 1897 until the time of his death 10 years later, he claimed to own the premises. He was about 21 years of age at the time of his marriage. The record shows he was an industrious, frugal man, of good habits. He commenced at once to make improvements upon the place, and during his occupancy put a cellar under the house, constructed and equipped a bathroom, and added a second story to the house, all of which was done by his labor or at his expense. What was done by him and his family is not likely to have been different from what it would have been if he was possessed of the record title to the premises. See *Taft* v. *Taft*, 73 Mich. 502 (41 N. W. 481), *Pike* v. *Pike*, 121 Mich. 170 (80 N. W. 5, 80 Am. St. Rep. 488), and the many cases cited therein. His two children, one seven and the other four years of age at his death, were born in the house so improved by him. It is not reasonable to believe that this young man of limited means would have made these liberal expenditures, had he not believed he was creating a home for himself and his little family.

The decree of the court below is affirmed, with costs.

HOOKER, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

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BROWN v. BROWN.

1. WITNESSES — ESTATES OF DECEDENTS — DISQUALIFICATION OF PARTY IN INTEREST—STATUTES.
   The complainant in a suit to impress a transaction in the nature of a mortgage, executed in the name of her deceased son, with a trust in complainant's favor, on the theory that she advanced the funds for the loan, and deceased acted as her agent, is not a competent witness as to matters equally within the knowledge of deceased. 3 Comp. Laws, § 10212.

2. SAME—AGENT—HUSBAND AND WIFE.
   Nor is her husband who participated in the negotiations as complainant's agent, a competent witness as to similar matters, under the statute, as amended by Act No. 239, Pub. Acts 1901.

3. TRUSTS—ESTATES OF DECEDENTS—MORTGAGES.
   Evidence considered and *held* to warrant a decree for defendant, upon a bill in equity to subject a loan made in decedent's name to a trust in favor of complainant, who claimed to have advanced the money.

Appeal from Huron; Beach, J. Submitted October 20, 1910. (Docket No. 91.) Decided November 11, 1910.

Bill in chancery by Harriet Brown against Matilda Brown as administratrix of the estate of Harvey H. Brown, deceased, and others, to declare and enforce a trust. From a decree for defendants, complainant appeals. Affirmed.

George W. Bates and *George M. Clark*, for complainant.

John F. Murphy and *Charles D. Thompson*, for defendants.

MCALVAY, J. The complainant filed her bill of complaint in the circuit court for Huron county, in chancery,

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against defendant, administratrix of the estate of her son, Harvey H. Brown, deceased, and the representatives of his minor children, and also William J. Stephenson and wife, to subject certain land now held by the estate of said deceased son to a trust in her favor, which she claims her son acquired in his name while acting as her agent, on April 4, 1906. She alleges that a man named Stephenson and his wife owned this land, and, desiring to borrow $1,200, she made the loan through her husband, Levi Brown, and her son, now deceased, and as security therefor a deed was by her allowed to be taken in the name of said deceased, who gave a land contract back to Stephenson and wife, agreeing to sell them said land on payment to him, on or before three years, of the sum of $1,200, with interest at 6 per cent., payable annually. On April 23, 1907, the son met his death by drowning while the title to this property was in his name. His administratrix claims that the money so loaned was his money, and that the property, subject to the land contract, was his property. There was no dispute but that this transaction amounted to a mortgage given to secure a loan of money. The only material fact in dispute was as to whether the money was complainant's and was loaned for her. Defendants Stephenson and wife answered the bill of complaint, disclaiming any interest in the controversy, except the rights under their contract to pay the money loaned to them and receive a deed therefor. This money, with interest, they paid into court before the decree. The case was heard upon proofs taken in open court, and a decree was granted against the complainant, with costs, wherein the court found that the son "in his lifetime was the owner of the fund represented by the securities involved in the loan made by him to said William J. Stephenson;" that the money paid into court was the property of the administratrix, and was ordered to be paid to her by the register of the court. Complainant has appealed.

The question to be determined in the case is one of fact. Under the statute (section 10212, 3 Comp. Laws) com-

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plainant was not a competent witness "to testify at all to matters which, if true, must have been equally within the knowledge of the deceased person." This leaves but little, if any, of her testimony to be considered. In the matter of this loan, Levi Brown testified that he acted as the agent of his wife, the complainant, and was called and testified in her behalf as a witness to this agreement with the deceased, and the part he took in the transaction prior to the death of Harvey H. Brown. This witness, under the statute above cited, as amended by Act No. 239, Pub. Acts 1901, was under the same prohibition as complainant, his principal, and as to all such matters his testimony cannot be considered.

Two other witnesses, brothers of the deceased, testified, as to the principal facts in the case, that they were present when the agreement was made between the mother, who furnished the money for this loan, and their dead brother, who agreed to take the deed and make the contract in his name, for and in behalf of complainant; and one or both of them also testified that the $1,200 was counted over in the house in Harvey's presence, and handed to him by the mother, and that these papers, when executed, were brought to the house and delivered to the mother, who had kept them continuously since that time, and that when Harvey collected the first year's interest he brought it home and gave it to the mother. The foregoing is, in brief, complainant's case.

The banker who drew the deed and contract at the request of the deceased son, Levi Brown, his father, and Mr. Stephenson testify that complainant's name was not mentioned at the time, and the papers were drawn, as directed, in Harvey's name. The money was not paid over in the presence of witness, but the papers, when completed, were taken away. Mr. Brennan, also in the banking business, testified that he was collecting for a client of his money on a mortgage of $800 which Stephenson was about to pay, and these three persons came in to pay this money. They brought only $800, and "they concluded

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to settle it all up there—that is, to make the payment of the whole of the money;" that Harvey went out after the other $400, brought it in, and laid it on witness' desk, who counted it for them. The administratrix, widow of decedent, a competent witness, testified that she was present in her home when Stephenson brought the first year's interest of $72 and paid it to her husband, who wrote a receipt for it at the time. Levi Brown stated as a witness on cross-examination:

"*Q.* Wasn't that a gift from your wife to your son?
"*A.* No; Harvey had $2,000 then in the house, more money than she had, and we can prove it."

The son Albert testified:

"*A.* He had some money; yes, I guess he did.
"*Q.* Do you know how much money he had?
"*A.* Well, he had $800 or $900 that I know of, at home.
"*Q.* He had saved that up?
"*A.* I guess he had. He had it there, anyway."

This testimony, to which may be added the presumption arising from the papers as drawn, warranted the finding and decree of the learned trial judge. We agree with his determination of the case, and have no doubt from this record that the view of the appearance and manner of the witnesses at the hearing was of substantial benefit in determining the weight to be given to their testimony.

The decree is affirmed, with the added provision that the administratrix make proper release and transfer upon receipt of the fund in question from the register in chancery. Costs are awarded to defendants.

HOOKER, MOORE, BROOKE, and BLAIR, JJ., concurred.

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PALMER v. FAGERLIN.

1. BILLS AND NOTES — PUBLIC POLICY — DIVORCE — COMPROMISE AND SETTLEMENT.
   A promissory note of defendant, a married man, executed in connection with divorce proceedings instituted by defendant's wife, in partial settlement of property matters, under an agreement with the wife's solicitor, prepared and signed after the commencement of suit, is not void as against public policy.

2. DIVORCE—ALIMONY—SETTLEMENT BETWEEN PARTIES.
   After an actual separation or the filing of a bill for divorce, amicable settlements between the parties relating to their property interests are not only lawful but commendable.

Error to Montcalm; Davis, J. Submitted October 20, 1910. (Docket No. 93.) Decided November 11, 1910.

Assumpsit in justice's court by Lucian C. Palmer against Peter Fagerlin and Fred W. Johnson. A judgment for plaintiff, on appeal to the circuit court, is reviewed by defendant Fagerlin on writ of error. Affirmed.

Frank A. Miller (*R. A. Hawley*, of counsel), for appellant.

N. O. Griswold, for appellee.

BROOKE, J. This is an action in which plaintiff seeks to recover the sum of $40 and interest; that being the amount of a promissory note given by defendant to plaintiff.

It appears that Ada E. Fagerlin, wife of defendant, had on August 12, 1908, filed a bill of complaint for a divorce against her husband, plaintiff herein acting as her solicitor. On August 26, 1908, the husband, defendant herein, caused his appearance in said cause to be entered

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by Frank A. Miller as his solicitor. On September 3, 1908, Fagerlin, his wife, and her solicitor, had a conference for the purpose of adjusting their property interests. That meeting resulted in the execution of an agreement between Fagerlin and his wife as follows:

"STATE OF MICHIGAN—The Circuit Court for the County of Montcalm, in Chancery.

"Ada E. Fagerlin, Complainant,

vs.

"Peter Fagerlin, Defendant.

"Whereas, the parties hereto are husband and wife, and disagreements having arisen between them, resulting in application for divorce and alimony, by and on the part of complainant and against defendant; and, whereas, the parties hereto are desirous of making full and complete settlement of all property interests: Therefore, it is hereby agreed as follows:

"*First.* The said complainant doth hereby agree to execute and deliver to said defendant full and complete release of all dower and homestead rights in and to the lands of said defendant that she may have and hold by virtue of their marital relations.

"*Second.* That said defendant, in consideration of the execution and delivery of such release, doth hereby agree to and with the said complainant to properly care for, cut, harvest, and market all of the crops now standing and growing (or in whatsoever form the same may be) and located on the premises of complainant, and give to the complainant one-half thereof.

"*Third.* Said defendant further agrees to give complainant one brood sow, the same designated and agreed upon between them, also ten bushels of oats, also release in full for any claim he may have or hold to certain young stock sold by complainant.

"*Fourth.* Defendant further agrees to pay to L. C. Palmer the just and full sum of $40.00, in lieu of application for solicitor's fees and expense in and about said suit, the same to be payable in cash or by good endorsed note and payable at a time not exceeding one year; said note to be approved by the State Bank of Edmore.

"*Fifth.* Complainant agrees to pay to the said L. C. Palmer the sum of $10.00, at such time as may be agreed upon.

"In witness whereof, the parties to these presents have

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hereto set their hands and seals the third day of September, A. D. 1908.

"ADA FAGERLIN. [L. S.]
"PETER FAGERLIN. [L. S.]

"Signed, sealed and delivered in the presence of:
"L. C. PALMER,
"MARGARET E. BATSON."

The note in suit herein is the one provided for in section 4 of the above agreement. On October 1, 1908, Fagerlin answered his wife's bill of complaint. Section 14 of his answer is as follows:

"This defendant, further answering, avers that on the 3d day of September, A. D. 1908, said complainant and this defendant agreed upon a settlement of their property interests wherein the said complainant agreed to execute and deliver to the defendant a release of all dower and homestead rights in the lands of this defendant that she might hold by virtue of being his wife, and this defendant agreed in consideration of the release to care for, harvest, and market all the crops then growing on her land and give her one-half the same, and further agreed to give her a certain pig and 10 bushels of oats, and release any claim that he had to certain young stock that she had sold. He also agreed to pay her solicitor the sum of $40 in lieu of application for solicitor's fees and expenses in the divorce court, the same to be payable in cash or by good endorsed note, and payable at a time not exceeding one year, said note to be approved by the State Bank of Edmore, and the complainant agreed to pay the said Palmer $10 at such time as might be agreed upon."

Ada E. Fagerlin had instituted another divorce proceeding against defendant about a year before the last one was launched. That suit was abandoned and the parties became reconciled and lived together for some months before the second bill of complaint was filed. From the fact that on December 13, 1909, when this suit was tried, she was still Fagerlin's wife, and appeared as a witness for him, it would appear that the second divorce proceeding has been abandoned. When sued upon the note, defendant gave notice under his plea of the general issue that he would prove that the consideration for the note was il-

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legal and against public policy. After setting out the contract between himself and his wife, he further states:

"At said time and place it was also understood and agreed that the said defendant, Peter Fagerlin, the defendant in said divorce suit, should not appear in said divorce suit, and should not contest the same, but let the same go by default."

Upon the trial, which took place before the judge without a jury, defendant gave evidence tending to support his claim that at the time the agreement was signed he agreed that he would not defend if certain charges made against him in the bill of complaint were eliminated. His wife was sworn, and testified that:

"*Q.* The object of the settlement at Edmore, as you understood it, was to fix your property matters so that there would be no more dispute about these cattle and no more dispute about the crops growing upon your land, wasn't it?

"*A.* Well, the cattle, he had them. That didn't bother me anyway, but it was to stop a lawsuit and a great lot of expense.

"*Q.* Over the property?

"*A.* Yes, sir.

"*Q.* There was some talk there about striking out certain charges in the bill of complaint?

"*A.* They didn't say that before me. They had that talk to themselves. I didn't hear that."

It is to be noted that defendant filed his answer in the divorce proceeding nearly a month after the contract was made between himself and wife. He was there represented by competent counsel, and while he sets out the gist of the contract, and apparently relies upon it to defeat any attempt on the part of his wife to secure alimony or solicitor's fees, he fails to make mention of any collusive agreement which would defeat the contract itself. It seems to us clear from the testimony of the wife, and the conduct of the defendant, after the execution of the contract, that the learned circuit judge was correct in his finding as a fact that there was no collusive agreement be-

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tween the parties to this suit. The record shows conclusively that there was no collusion between Fagerlin and his wife relative to the starting of the divorce proceedings. Therefore the authorities cited by defendant are not applicable. This court has consistently held that, after actual separation or the launching of a bill for divorce, amicable settlements between the parties, of their property interests, are not only lawful but are to be commended. *Randall* v. *Randall*, 37 Mich. 563; *Owen* v. *Yale*, 75 Mich. 256 (42 N. W. 817).

The judgment is affirmed.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

PEOPLE v. DUNNIGAN.

1. CRIMINAL LAW—EVIDENCE—ADMISSIONS—PRIVILEGED COMMUNICATIONS.

   A letter from one in jail, accused of a crime, written to his wife, containing incriminating admissions and obtained by prearrangement between the sheriff and an acquaintance of respondent who visited him in jail and promised respondent to deliver the communication to the wife, but turned it over to the sheriff, is not a privileged communication under 3 Comp. Laws, § 10213.

2. SAME—CONFESSION.

   While a confession obtained by improper threats or promises that may lead the accused to think it is for his interest to make a confession, regardless of its truth or falsity, is inadmissible, the letter was not subject to such objection.

Error to Hillsdale; Chester, J. Submitted October 21, 1910. (Docket No. 166.) Decided November 11, 1910.

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William Dunnigan was convicted of murder and sentenced to imprisonment for life. Affirmed.

Paul W. Chase and *Frank M. Hall*, for appellant.

Clayton A. Powell, Prosecuting Attorney, and *Franz C. Kuhn*, Attorney General, for the people.

BROOKE, J. Respondent was convicted of murder in the first degree, and is now serving a life sentence in the State prison at Jackson.

The record discloses the fact that two other men, Knox and Smith, were in custody awaiting trial, charged with the same homicide, when respondent was arrested and confined in jail charged with some petty offense. He had testified on the examination of Knox and Smith before the justice and at the trial in circuit court. The testimony he had given tended to incriminate Knox and Smith, and to show his own innocence. While respondent was in jail, Bibbins, undersheriff, and Stone, deputy sheriff, of the county, made an arrangement with one Wilcox, an acquaintance of respondent, to the effect that he, Wilcox, should, for a consideration, be admitted to respondent's cell for the ostensible purpose of cutting respondent's hair; that Wilcox should get what information he could from respondent, and turn it over to the sheriff. In pursuance of this plan, Wilcox was admitted to respondent's cell, and there suggested that, if respondent desired to communicate with his wife, he, Wilcox, would convey a letter to her. Acting upon this suggestion and relying upon the good faith of Wilcox, respondent wrote and delivered to him a letter addressed to Nora, his wife, which Wilcox immediately turned over to the sheriff. Respondent was then indicted for murder, and, upon his trial, the letter was offered and received in evidence, and was as follows:

"*Dear Nora:* I want to tell you something. If they ask you any questions, tell them that I got home at 12 o'clock, and if they ask you if I had a watch that night, tell them no, or no ring, if they should ask you, for I have

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told them that Walter Knox got the watch and ring, for I had to do it in order to clear myself, and I guess I can if you will help a little. It will mean five years for Walter Knox and life for Smith, and I don't know how much for myself. Now, don't forget to stick to what I have told you, will you, for it will help me a lot. Now, do as I have told you.

"From WILL."

Objection was made to the admission of the letter upon the ground that it was a privileged communication between husband and wife, and also because it had been procured from respondent by artifice and fraud. The sole assignment of error is that the trial judge erred in admitting the letter.

It is urged on behalf of respondent, and an examination of the record leads us to believe, that the letter was the principal, if not the only tangible, evidence against the accused. The importance of the ruling is therefore apparent. We will first consider the question of privilege. There can be no doubt that respondent intended the communication to be for his wife only. It passed out of his control, and never reached hers. Is its admission as evidence forbidden by the statute? That portion under consideration provides:

"Nor shall either, during the marriage, or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage. * * *" 3 Comp. Laws, § 10213.

The identical question here presented was carefully considered in the late case of *O'Toole* v. *Insurance Co.*, 159 Mich. 187 (123 N. W. 795, 24 L. R. A. [N. S.] 802), where the authorities are cited and considered. In that case we said:

"And so it has been held, and, we think, correctly, that where the communication, oral or written, has, without collusion or voluntary disclosure, escaped the custody and control of the parties communicating, or the custody and control of their agents or representatives, it is not privileged."

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Regarding the letter in question as a confession of guilt, was it admissible? It is urged on behalf of respondent that it was not, and the case of *People* v. *McCullough*, 81 Mich. 25 (45 N. W. 515), is cited. It must be admitted that certain language is found in that opinion which affords a basis for respondent's claim. There, in discussing confessions generally, this court said:

"But they must be voluntary, and without any influence being exerted by the officer, either of threats, promise, artifice, or duress."

This declaration is broader than was required for the determination of the case there under consideration, and we think, taken baldly and without explanation or qualification, it does not accurately state the law. From a review of all the authorities, it would appear that the true reason for the rule for the exclusion of involuntary confessions—*i. e.*, those obtained by improper threats or promises—is that, because of such threats or promises the accused is led to believe that it is for his interest to make the confession, regardless of its truth or falsity. *People* v. *Wolcott*, 51 Mich. 615 (17 N. W. 78); 1 Wigmore on Evidence, §§ 821, 822, and cases cited in note. The use of artifice, trickery, or fraud in inducing a confession will not alone render such confession inadmissible as evidence. If the artifice used involved a promise tending to induce a false confession, it would operate to exclude, not because of the trick, but because, by use of the trick or artifice, an untrue confession had been secured. 1 Wigmore on Evidence, § 841, and cases cited; 12 Cyc. p. 476, and cases cited.

Applying these principles to the case under consideration, it is apparent that the promise of Wilcox to carry a letter from respondent to his wife could in no manner have operated upon respondent's mind to induce him to falsely admit his guilt. The record discloses the fact that the letter was written by respondent himself, and it does not appear that its contents were suggested by Wilcox or

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any other person. While we feel constrained to hold that the learned circuit judge did not err in admitting the document, we do not wish to be understood as setting the seal of our approval upon the methods used in securing it. Those methods were distinctly reprehensible. The presumption of innocence surrounds all persons charged with the commission of crime, and it is the duty of those charged with the custody and prosecution of such persons to treat them with fairness in order that the innocent may thereby be protected, and the guilty convicted and punished. When such a course is followed, the dignity of the law is upheld and its administration is, as it should be, above criticism.

The conviction must be affirmed.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

In re MOOR'S ESTATE.

NAGELI *v.* MCMORRIS.

1. WILLS—BEQUESTS—LIFE INTEREST.
   A bequest to the wife of testator of his personal property, except notes, mortgages, bonds and similar valuables, of which only the use and interest during her life was granted, the same to be equally divided after her death among his brothers and sisters, operates as a gift of the other property absolutely, and transfers a life interest in the excepted securities.

2. SAME—DEVISE—REAL PROPERTY—LIFE ESTATE.
   A devise of testator's real property to his widow, under like re-

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strictions, conveys a life estate, notwithstanding a subsequent provision in the instrument that, although she should have the right to dispose of the real estate, the testator expected her to carefully and prudently save and invest the proceeds realized from the sales thereof, for the benefit of the other devisees.

3. SAME.

Her failure to comply with such requirement would charge her estate with liability for the proceeds of sales of the realty.

4. SAME—CONSTRUCTION—EVIDENCE.

Where the language of a will is plain and unambiguous, the intention of the testator must be gathered from its terms and is not to be determined from alleged declarations made by testator after its execution, or from the subsequent condition of the parties in interest.

5. SAME—DEVISES—LIFE ESTATE.

A life estate expressly created will not be converted into a fee absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive. *Jones* v. *Jones*, 25 Mich. 401, distinguished.

6. WORDS AND PHRASES—USE.

Use is the employment of a thing or applying it to one's service; not the thing itself or any part of it; of a building, use refers to the rent obtainable; of money, the interest.

Certiorari to Bay; Collins, J. Submitted October 17, 1910. (Docket No. 12.) Decided November 11, 1910.

Catherine McMorris, administratrix, presented to the probate court a petition for the construction of the will of Caspar Moor, deceased. From the order entered construing the instrument, Anna Nageli appealed to the circuit court. A judgment modifying the order of the probate court is reviewed by the administratrix on writ of certiorari. Affirmed.

F. W. De Foe (*Hugo P. Geisler*, of counsel), for appellant.

Pierce & Kinnane, for appellees.

BROOKE, J. The only question involved in this pro-

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ceeding is the proper construction to be given to the will of the deceased. That will is as follows:

"I, Caspar Moor, of West Bay City, in Bay county, State of Michigan, of the age of forty-seven years, and being of sound and disposing mind and memory, do ordain, publish and declare this as and for my last will and testament in the manner following, that is to say:

"There being no issue from the matrimony with my wife, Magdalena Moor, née Zybach, I hereby give and bequeath to her all my personal property of what kind and nature soever, with the restriction, however, that so far as such personal property consists of moneys, notes, mortgages, bonds or similar valuables, she shall only have the use and interest of the same during the time of her life, and that after her death such property shall be equally divided among my brothers and sisters or their heirs, if any of my brothers and sisters should have departed this life before the death of my said wife.

"I further give and devise all my real estate to my said wife under the same restriction and condition as hereinbefore mentioned, and although my said wife shall have the right to dispose of the real estate hereby devised to her, I confidently expect that she will carefully and prudently save and invest the proceeds realized from the sales of such real estate for the benefit of my brothers and sisters and their heirs, as the case may be.

"And I hereby appoint my said wife executrix of this my last will and testament.

"In witness whereof, I have signed and sealed these presents and declared the same as and for my last will and testament, at Bay City, in the county of Bay and State of Michigan, this nineteenth day of June, A. D. 1879.

"CASPAR MOOR. [L. S.]

"The above instrument, consisting of one-half sheet, was at the date thereof, by the said testator, Caspar Moor, signed and sealed and published and declared as and for his last will and testament, and we, the undersigned, have subscribed our names thereto as attesting witnesses, in the presence of the said testator, and of each other, the day and year hereinbefore mentioned.

"HARVEY GILBERT,
"F. SIMON,
"E. ANNEKE.

"Residing in Bay City, Bay County, Michigan."

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By the terms of the order, made by the court below, it was determined that under this instrument Magdalena Moor took a life estate only in the real estate and in that portion of the personal estate covered by the restriction. It is urged on behalf of appellant that a proper construction of the language used by the testator would result in a holding that Mrs. Moor took an absolute title in fee simple to all the property mentioned in the will.

We think it should be said at the outset that rarely, if ever, has a will been presented to this court for construction where the intention of the testator may be so clearly and certainly determined by an examination of the language used. At the time the will was executed, the testator was engaged in two lines of commercial endeavor. He had a meat market, and was a commercial fisherman. In both lines of business, certain personal property was employed. This property, and all his other personal property, except "moneys, notes, mortgages, bonds or similar valuables," by the terms of the will was given to the wife absolutely. Touching these excepted items, the will declares that "she shall only have the use and interest of the same during the time of her life." The will then further provides "that after her death *such property* shall be equally divided among my brothers and sisters or their heirs."

We next consider the clause dealing with the real estate. This we find is given and devised to the wife "under the same restriction and condition as hereinbefore mentioned." That the restriction here mentioned refers to the one contained in the earlier paragraph of the will relating to certain personal property is not even questioned. This language, and this alone, is the source of Mrs. Moor's interest in the real estate. The concluding portion of the paragraph, in which she is clothed with the power of disposition, cannot possibly be construed to enlarge that interest, or to change it from a life estate to one in fee. While she is not commanded, she is confidently expected, to "carefully and prudently save and invest the

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proceeds realized from the sales of such real estate for the benefit of my brothers and sisters and their heirs, as the case may be." Her failure to comply with this injunction would not relieve her estate from the necessity of accounting to the brothers and sisters of the testator for the proceeds of such sales. By the terms of the devise *she was given the use of* the real estate for life only. The testator *expected* that she would prudently save and invest the proceeds of any sales she might make. Whether she did as he expected or not, her interest in the real estate was not by this language enlarged.

Where the language of the will is plain and unambiguous, as we find it to be in this case, it is elementary that the intention of the testator must be gathered from its terms. Testimony of the condition of the parties and of alleged declarations of the testator, made subsequent to the execution of the will, as to his intention, was offered in the court below. Such testimony cannot be considered, when it is possible to determine, from the words used, the true intention of the testator. *Kinney* v. *Kinney*, 34 Mich. 250; *Tuxbury* v. *French*, 41 Mich. 7 (1 N. W. 904); *Toms* v. *Williams*, 41 Mich. 552 (2 N. W. 814); *Waldron* v. *Waldron*, 45 Mich. 350 (7 N. W. 894); *Wales* v. *Templeton*, 83 Mich. 177 (47 N. W. 238); *Wheeler* v. *Wood*, 104 Mich. 414 (62 N. W. 577); *Sondheim* v. *Fechenbach*, 137 Mich. 384 (100 N. W. 586).

Appellant contends that this case is controlled by *Jones* v. *Jones*, 25 Mich. 401, *Dills* v. *La Tour*, 136 Mich. 243 (98 N. W. 1004), and cases of like character. In that line of cases the testator, after making an absolute devise, with full power of alienation and consumption, attempted to control the disposition of such uncertain portion of the devised estate as might remain after the death of the original devisee. The distinction between such cases and the one under consideration is clear and broad. Here there is no power granted to consume the corpus of the estate or any portion thereof; but the first taker's interest is strictly limited to the use and interest thereof during her life.

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We deem it unnecessary to cite authorities to sustain this construction, but an examination of the following will be found instructive upon the point involved: *Glover* v. *Reid*, 80 Mich. 228 (45 N. W. 91); *Gadd* v. *Stoner*, 113 Mich. 689 (71 N. W. 1111); *Robinson* v. *Finch*, 116 Mich. 180 (74 N. W. 472); *Fecht* v. *Henze*, 162 Mich. 52 (127 N. W. 26). See, also, *Mansfield* v. *Shelton*, 67 Conn. 390 (35 Atl. 271, 52 Am. St. Rep. 285), where it is said:

"A life estate, expressly created, will not be converted into a fee, absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive."

A portion of the argument for appellant is based upon the use of the word "only;" it being appellant's contention that this word refers, not to the character of the estate to be enjoyed by Magdalena Moor, but to the term of its enjoyment. Such a construction is strained, unnatural and wholly unwarranted.

It is further urged the word "use," in the phrase "she shall only have the use and interest of the same during her life," should be interpreted as granting the power of consumption. Webster defines the word, used as a noun, primarily as follows:

"The act of employing anything, or of applying it to one's service; the state of being so employed or applied; application; employment; conversion to some purpose; as, the *use* of a pen in writing; his machines are in general *use*."

In *Spooner* v. *Phillips*, 62 Conn. 62 (24 Atl. 524, 16 L. R. A. 461), the court, in defining this word, said:

"What is the ordinary meaning of the *use* of a thing? It is not the thing itself, or any part thereof, but is that which the thing will produce. If it is a house or other building, or any other form of real estate, it is the rent which can be obtained for it. If it is money, it is the interest which it will earn."

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The word clearly does not, in its ordinary acceptance, impart the power to dissipate, destroy, or consume.

Our conclusion is that the intention of the testator is plain, that he used apt and unambiguous language to express that intention, and that by his will he gave to his wife a life estate only in the restricted portion of his personal estate and in his real estate.

The order of the circuit court is therefore affirmed.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

PEOPLE, *ex rel.* SUTHERLAND, *v.* FORD.

PUBLIC OFFICERS — APPOINTMENT — QUO WARRANTO—VILLAGES—MUNICIPAL CORPORATIONS.

After the resignation of a member of the board of village trustees, and the holding of a special election to elect a successor, the council of the village determined the result of the election, declaring the respondent elected. A motion was carried permitting the candidate to qualify at once and to take office. *Held* that although, under 1 Comp. Laws, § 2711, the special election was invalid, and the vacancy should have been filled by appointment, the action of the village council complied with the statutory requirement and that quo warranto would not lie to oust respondent and vacate the office.

Error to Muskegon; Sessions, J. Submitted October 25, 1910. (Docket No. 110.) Decided November 11, 1910.

Information in the nature of quo warranto on the rela-

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tion of Alexander Sutherland, prosecuting attorney, against Joseph C. Ford, Jr., to determine the right of respondent to the office of village trustee. Judgment for respondent, and relator brings error. Affirmed.

Alexander Sutherland, Prosecuting Attorney (*Cross, Vanderwerp, Foote & Ross*, of counsel), for relator.

William Carpenter, for respondent.

STONE, J. This is a proceeding in the Muskegon circuit by information in the nature of quo warranto against Joseph C. Ford, Jr., to determine his right to hold the office of trustee of the village of Fruitport, a village organized under the general act relating to the incorporation, powers, and duties of villages within this State. A vacancy having occurred in the office of trustee, the council of the village ordered a special election for the purpose of electing a trustee to fill such vacancy. The election was held, and respondent Joseph C. Ford, Jr., received a majority of the votes cast at the election. The council met March 30, 1910, and determined the result of the election, whereupon the following proceedings were had:

"Moved by Kline and seconded by Seibert that J. C. Ford, Jr., be declared elected. Carried. Moved by Seibert, supported by Hendryx, that J. C. Ford, Jr., be allowed to qualify at once, and take his seat in the council. Carried."

Respondent thereupon qualified as such trustee, took his seat in the council, and thereafter participated in its proceedings, and thenceforth claimed the right to hold, exercise, and enjoy said office. It is conceded by counsel for the respective parties that a vacancy in the office of trustee of a village in this State must be filled by appointment by the council, as provided by section 2711, 1 Comp. Laws, which reads as follows:

"Any vacancy occurring in the office of president, trustees or any other elective office, shall be filled by appointment by the council, and such appointee shall hold his

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office until the next annual election thereafter. All vacancies in any other office shall be filled by the president, by and with the consent of the council."

It is also conceded that the aforesaid election was of no force or validity in entitling respondent to the office. But it is claimed by the respondent, and was so held by the circuit judge, that the action of the council above set forth constituted and amounted to an appointment of respondent to the office of trustee under the statute. The respondent had judgment, and the relator has brought error. The correctness of the ruling below is challenged by the assignments of error; it being the claim of the relator and appellant that the council never exercised its appointive power to fill the vacancy, and that said office is still vacant, and must remain so until the council shall have exercised that judgment and discretion without which no appointment to office can be made.

It is the claim of the respondent that some light is thrown upon the intention and action of the council at its said meeting of March 30, 1910, by what it did immediately after it seated respondent as aforesaid, relating to another vacancy in the office of trustee. The following resolution was offered:

"Whereas, a vacancy has been created by the resignation of H. J. Curtiss, as trustee, and whereas, the village has been put to the extra expense of one special election, and whereas, at said special election, out of ninety-four votes cast, one Arthur Gallup received forty-five votes: Therefore be it resolved that said Arthur Gallup be appointed as trustee by the council, to fill the vacancy caused by the resignation of said H. J. Curtiss. Trustee Hendryx moved the foregoing resolution be adopted, supported by Gilbert. Moved by Seibert, supported by Kline, that the motion be amended by striking out the words 'be adopted,' and inserting 'be submitted' to competent legal authority by the president, and a written legal opinion be secured as to the legality of the council filling the existing vacancy, without holding aspecial election, and that said legal opinion be submitted to the council at the regular April meeting. Carried."

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It is the claim of counsel for respondent that from the foregoing action it will be seen that it was already in the minds of the members of the council that the vacancy must be filled by an appointment by that body.

Perhaps the vital question here is: Does it appear that the council by its action designated the respondent as the person who should assume and perform the duties of the office in question? Upon that subject the learned circuit judge said:

"I am of the opinion that the action taken by the council can be construed in no other way than as an appointment. By 'appointment' is meant a selection, an election, a designation, a choosing, and the language is fit and proper to indicate a choice of Mr. Ford to act as trustee of the village. And more than that, the fact that he was designated, that he accepted the office, that he qualified, and was permitted to sit as a trustee upon the board of trustees, or the council, is sufficient in itself to constitute an appointment. It was a recognition of his right, and a selection of Mr. Ford to that office. The language is appropriate, and it matters not whether the selection was made in accordance with the express wishes of the people of the village of Fruitport, at the election (which could have been nothing more than advisory in any event), or whether it was the independent action of the council. In either event Mr. Ford was duly appointed to the office of trustee, and is entitled to hold that office."

We fully concur in the views above expressed, and are of opinion that the question here involved was settled by this court in *Pariseau* v. *Board of Education of City of Escanaba*, 96 Mich. 302 (55 N. W. 799). That was a mandamus case commenced in this court. It was there held that where a member of the board of education of a city places his resignation in the hands of the president of the board just prior to the charter election, after which he accepts a nomination for alderman in a caucus which places in nomination a candidate to fill the vacancy supposed to have been created by such resignation, both of whom are voted for at the election, and a nominee to fill such vacancy is declared elected on a canvass of the

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votes by the common council, to which such resignation should have been tendered, and which alone had power to accept it, and the board of education admits said nominee to a seat in its body, said member is not in a position to question the validity of such action on the ground that the board alone had the power to fill the vacancy, if one existed, and that he never tendered his resignation to the common council, for which reason no vacancy existed, to be filled by election or otherwise.

Here it appeared that relator's resignation was not acted upon by the proper body, and that the incumbent whose place he sought to obtain had not been appointed by the board of education, unless its action in declaring him entitled to a seat was equivalent to such appointment. This court held the resignation effective, and a vacancy thereby occasioned, and the choice of Mr. Champ—the incumbent—as a member of the board valid. We quote from page 306 of 96 Mich. (55 N. W. 801):

"It is true that by the provisions of the charter his (relator's) resignation should have been tendered to the common council, but the clerk of the city had been advised that there was to be a vacancy, and, acting in good faith, published the notice of election. The vote was taken, and the council acted upon it, declaring Mr. Champ elected. This was equivalent to an acceptance of the relator's resignation, under the circumstances, by the council. The vacancy, by this act, was then declared, even if the relator were in a position to set up the claim of want of vacancy; and, though the election by the people may not be considered as giving Mr. Champ a right on the board, yet the action of the board, after the vacancy thus occurred, legally seated Mr. Champ, as the board, in case of a vacancy, had a right to fill it."

There, the board of education, acting upon the declaration made by the council that Mr. Champ was elected, admitted him as a member. The mere admission to membership in the board was all the indication there was that the board had actually selected and designated him as the person to fill the vacancy then existing.

In this case, the council itself, the body of which re-

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spondent became a member, declared him elected, and thereby ratified and approved the action of the electors, and then by special motion admitted him to a seat in its body, thus specifically designating him as the one who should fill the vacancy. There is no question raised but that the council acted in good faith, and with the desire that respondent should occupy the office which he now holds.

We think his appointment was valid, and the judgment of the court below is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

McINERNY *v.* HAASE.

1. PERPETUITIES—ESTATES—WILLS—LIFE ESTATE.
   A will creating a life estate in the testator's widow, a life estate in his daughter after the widow's death, title to vest in a granddaughter, if living at the termination of the life estates; if not, title to vest in his surviving grandchildren, does not violate the statute (8 Comp. Laws, §§ 8796, 8797), which prohibits the suspension of the absolute power of alienation for a longer period than two lives in being at the creation of the estate.

2. SAME.
   The period of suspension is not determined by the fact that more than two lives were in being when the estate was created, who, by a contingency, might share in its distribution, but by the number of life estates between the creation of the estate and its enjoyment in possession.

3. SAME—VESTED REMAINDERS.
   The devise created a vested remainder in the granddaughter, subject to be divested in the event of her death during the life of the mother.

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4. SAME—CONTINGENT REMAINDERS—STATUTES.

Remainders are vested when there is a person in being who would have an immediate right to possession on termination of the intermediate or precedent estate; contingent, when the person to whom or the event upon which they are limited, remains uncertain. 3 Comp. Laws, § 8795.

Appeal from Macomb; Erskine, J. Submitted October 26, 1910. (Docket No. 104.) Decided November 11, 1910.

Bill by Hannah McInerny against Mary Jane Haase for the construction of the will of Denis Kelleher, deceased. From a decree sustaining the validity of the estates devised, complainant appeals. Affirmed.

George W. Coomer, for complainant.

Fox & Dohany, for defendant.

MCALVAY, J. The bill of complaint in this case was filed for the purpose of obtaining a construction of the will of Denis Kelleher, who died on or about March 1, 1862. His will was admitted to probate April 9, 1862. Complainant is the daughter of the testator and the defendant is a daughter of the complainant, and she and another child of complainant were living at the time of the death of the testator. After his death, two children were born to complainant, who are now living. The widow survived the testator and occupied the premises during her lifetime, dying in the year 1868. Upon her death, the daughter Hannah, the complainant, took possession of the real estate in question, and has continued to occupy the same to the present time.

The will in question reads as follows:

"Erin, Macomb County, State of Michigan,
"January 24th, 1862.

"Know all men by these presents, that I Denis Kelleher, of the township of Erin, county of Macomb and State of Michigan, do hereby solemnly make this my last will and testament, being in full possession of my mental

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faculties, thank God: I do therefore give and bequeath to my loving wife, Mary Kelleher, my farm in the aforesaid town, described as follows, to-wit: The northwest quarter of the northwest quarter of section 6 in township 1 north, of range 13 east, also the whole of my personal property to have and to hold during her life time, and upon her death I bequeath to my affectionate daughter, Hannah the same property and finally, upon Hannah's death, to my granddaughter, Mary Jane McInerny, should she survive her mother Hannah. And in case the said Mary Jane dies before her mother Hannah, then it is my will that the aforesaid property be equally divided among the surviving children of my daughter Hannah.

"Provided that my son, John Francis Kelleher, who is at present in the United States Army, should return to this place whoever holds the property at the time shall pay him five dollars. And the Lord have mercy on my soul."

It is the contention of complainant that this will of Denis Kelleher is void because in contravention of sections 8796, 8797, 3 Comp. Laws, which provide in substance: That the absolute power of alienation shall not be suspended for a longer period than during the continuance of two lives in being at the creation of the estate, and that such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. Complainant contends that the case presents both propositions under these sections, that the court below passed upon but the first in the order above stated, and, as to that proposition, his construction should be reversed.

Is there any force in complainant's contention? Every will speaks from the death of the testator, and the statutes relied upon must be considered with reference to that fundamental proposition. Not considering for the present in the will under construction the clause which is claimed to defeat a devise in remainder, we find that the testator provided a life estate in his wife, a life estate in his daughter Hannah, and a remainder in the granddaughter, Mary Jane, upon the termination of the intermediate

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estates for life. Two estates for life were created. Upon the termination of those life estates, the suspension of the power of alienation ceased. More suitable or simple words could not have been chosen by a testator drawing his will in conformity with the section of our statute fixing the period within which the power of alienation may be suspended in this State. There can be no difference of opinion upon this conclusion, and we do not understand that complainant contends to the contrary. The dispute arises on account of the words of the will above referred to, used in the devise of the remainder, which we italicize:

"And finally upon Hannah's death, to my granddaughter, Mary Jane McInerny *should she survive her mother Hannah. And in case the said Mary Jane dies before her mother Hannah, then it is my will that the aforesaid property be equally divided among the surviving children of my daughter Hannah.*"

In urging the claim that this provision suspended the power of alienation for a period longer than that fixed by the statute, complainant propounds the query:

"Were there more than two lives in being at the time of the creation of this estate and who, by any contingency, might share in its distribution?"

The period of suspension is not determined by the fact that more than two lives were in being when the estate was created who by a contingency might share in its distribution, but by the number of life estates between the creation of the estate and its enjoyment in possession. The contingency under which the estate in remainder would go to the surviving children of Hannah could not operate to extend the period of suspension, for the reason that it must occur within the lifetime of Hannah. This court has said:

"It matters not whether the estate may ultimately vest in one unborn at the time of the creation of the estate, for the existence or nonexistence of such a person has no effect upon the suspension of alienation, which must surely ter-

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minate upon the death of the life tenant." *Torpy* v. *Betts*, 123 Mich. 243 (81 N. W. 1094).

In that case alienation was suspended but for the life of one person, but the principle applies to this case where two life estates were created. The court quoted with approval from *Gulliver* v. *Wicket*, 1 Wils. 105:

"The number of contingencies are not material if they are all to happen within a life in being." *Torpy* v. *Betts*, *supra*.

It remains to be determined whether the last portion of the will quoted suspended the power of alienation, not based upon lives, contrary to section 8796. This depends upon whether the estate in remainder was vested or contingent. Our statute (section 8795, 3 Comp. Laws) defines such estates:

"Future estates are either vested or contingent: They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom or the event upon which they are limited to take effect, remains uncertain."

We find in the instant case, under this definition, that at the creation of this estate this granddaughter was such person then in being who would have such immediate right to possession. The conclusion is unavoidable that this was a vested remainder. See opinion, authorities, and notes on the distinction between vested and contingent remainders. *Kountz's Estate*, 213 Pa. 390 (62 Atl. 1103, 3 L. R. A. [N. S.] 639, 5 Am. & Eng. Ann. Cas. 427). Upon the contingency of the death of the grandchild during the life of the mother Hannah, the will provides for an equal division of this property among Hannah's surviving children. This is a clause divesting the estate, but does not alter the fact that it vested on its creation in the grandchild. *L'Etourneau* v. *Henquenet*, 89 Mich. 428 (50 N. W. 1077, 28 Am. St. Rep. 310); Gray, Rule against Perpetuities (2d Ed.), § 108, and cases

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cited. See *Hovey* v. *Nellis*, 98 Mich. 379 (57 N. W. 255).

Our conclusion is that neither contention of complainant can be sustained. The validity of the will as construed by the court is upheld.

The decree is affirmed, with costs.

BIRD, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

SACHSE *v.* HELPER.

1. SALES—WEIGHTS AND MEASURES—EVIDENCE.
   The contentions of defendants, in an action for the price of rags sold, that the evidence conclusively showed the parties contemplated that defendants should weigh the rags, and also that the defendants' weights were shown to have been correct according to the government standard, *held* not supported by the evidence.
2. SAME—QUANTITY—STANDARD WEIGHTS.
   Although goods were not weighed by United States standard weights, the question of the true weight or quantity concerning which the evidence of the parties, based on their respective scales, was conflicting, was one of fact.

Error to Bay; Collins, J. Submitted October 26, 1910. (Docket No. 118.) Decided November 11, 1910.

Assumpsit in justice's court by Eli Sachse against Samuel and Harry Helper and another for the price of goods sold. Plaintiff had judgment and defendants appealed to the circuit court. Judgment for plaintiff and defendants bring error. Affirmed.

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Gilbert W. Hand, for appellants.

Lewis P. Coumans, for appellee.

STONE, J. The litigation in this case involves the weight of some rags. The plaintiff claims that in the month of June, 1908, he sold to defendants 3,080 pounds of rags at 75 cents a hundred. The defendants claim that they bought 2,540 pounds only. The difference is 540 pounds, or $4.05. There was conflicting testimony as to the weight of the rags. A careful reading of the record satisfies us that the balancing of the different scales was the only test applied by either party, and the question was as to the right weight, as matter of fact. Such was the view of the circuit judge, and he submitted the case to the jury, and they found for the plaintiff in the sum above named.

The defendants have brought error, and in their assignments of error they claim:

(1) That the court erred in not directing a verdict for the defendants, and in refusing to give defendants' requests to charge, which were as follows:

"I charge you that the weight at Pinconning and West Bay City is no basis of the accuracy of the weights of the goods. I charge you that there is no testimony that the Pinconning weight was according to the government standard of weights, and therefore plaintiff has failed to prove the actual weight, and therefore plaintiff cannot recover."

(2) That the court erred in charging the jury as follows:

"There is no agreement in this case as to when or how these goods were to be weighed between the parties. * * * There is no agreement in this case that makes the Pinconning weight binding, or that makes the Helper weight binding."

Counsel for appellants argues his assignments of error together, and claims that the uncontradicted evidence shows that the rags sold to defendants were to be weighed by defendants on their scales. In this contention we think

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he is mistaken. He also claims that the defendants' weights were the correct weights according to the government standard of weights, and that they could not be impeached or disputed until the weights of some other scales that had been tested by the government standard of weights were introduced in evidence, and he refers to the case of *McGeorge* v. *Walker*, 65 Mich. 5 (31 N. W. 601), to sustain his position. The infirmity in the proposition is that there was no evidence to support it. Defendants rely upon the testimony of Joseph Julian upon this point. That witness testified as follows:

"The proper way to test scales is by the use of test weights. The city has a set here that were bought for the use of the sealer of weights and measures in Bay City. In the fall of 1907 I sold a pair of Buffalo scales, the kind that are fixed in the ground, to Helper Bros. At that time I tested them with the testing weights. They were correct when I put them in. This was in October, I think."

He further testified:

"The office of sealer of weights and measures is a dead letter in this town. They pay very little attention to it."

This was very far from showing that these scales had ever been tested by United States standard weights, or that they were correct in June, 1908.

To show how defendants' counsel understood it at the trial, we quote from the record his language in his motion to have the court direct a verdict:

"This motion is made for the reason that one set of scales is no comparison or criterion to test another set of scales by; that the only test is the government test; *that there is no evidence by either party that at the time of the weighing the test was in accordance with the government standard, either on the part of the plaintiff or on the part of the defendants;* that no presumption is to be drawn that the defendants' scales were incorrect by bringing in issue the weights of some other scales."

The circuit judge submitted the question of weights to the jury as one of fact, as follows:

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"There is no agreement in this case as to when or how these goods were to be weighed between the parties. There is no agreement in this case that both of them should be present at the original weighing. There is no agreement in this case that makes the Pinconning weight binding, or that makes the Helper weight binding. The burden of proof is upon the plaintiff to show that the rags in question weighed 3,080 pounds. If you are satisfied from the testimony that the rags weighed 3,080 pounds, the plaintiff is entitled to a verdict of $4.05. If that weight is correct, then the plaintiff is entitled to that verdict. If, on the other hand, the weight of 2,540 pounds is correct, then the defendants are entitled to your verdict. If the burden of proof shows that the weighing on the part of the plaintiff is the correct weighing, then, as I have before stated, you will give a verdict to the plaintiff. If the testimony between the two weights is such that you cannot tell whether either of those weights is correct, your verdict will be for the defendants. The situation is such that the plaintiff must satisfy you not only that his weight is correct, but that the other weight, the weight of defendants, is incorrect. The burden of proof requires that."

It cannot reasonably be said that because these goods were not weighed by United States standard weights the question of the true weight or quantity is forever foreclosed. There was evidence in the case, *pro* and *con*, of the different weighings, the mode of reaching results by the different witnesses, the tests applied, and all of the attendant circumstances. This evidence was, we think, properly submitted to the jury, and they were asked to find the correct weight as a question of fact.

We find no error in the record, and the judgment of the circuit court is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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NEWTON v. DETROIT UNITED RAILWAY.

1. PARTIES — GUARDIAN AND WARD — STATUTE OF AMENDMENTS — APPEAL AND ERROR.

   An action brought by a plaintiff, described as guardian of certain minors, may, under the statute of amendments, be treated on error as brought by plaintiff in his capacity of guardian, where the cause of action was for an injury to an automobile of the wards, in the possession of plaintiff, their general guardian, and where the objection was raised not by plea in abatement but by a motion to direct a verdict at the close of plaintiff's evidence. 3 Comp. Laws, § 10268 *et seq.*

2. SAME — INFANTS.

   The guardian was not an improper party plaintiff.

Error to Wayne; Hosmer, J. Submitted October 28, 1910. (Docket No. 161.) Decided November 11, 1910.

Case by Lumus C. Newton, guardian of the estate of Ruth C. Newton and others, against the Detroit United Railway for damages to an automobile. Judgment for plaintiff; defendant brings error. Affirmed.

Corliss, Leete & Joslyn (*William G. Fitzpatrick*, of counsel), for appellant.

Cullen, Casgrain & Hanley, for appellee.

STONE, J. This suit was brought by Lumus C. Newton, guardian of the estate of Ruth C. Newton, Charles W. R. Newton, J. Esther Newton, and Gilbert Newton, minors, by virtue of an appointment of the probate court for the county of Wayne, against the defendant to recover damages for an injury to an automobile belonging to said infants and in possession of said plaintiff, said injury having been caused by the alleged negligent conduct of defendant's servants and employés.

The declaration alleges, among other things, that:

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"On the 8th day of July, 1907, said plaintiff by his agent and servant was driving his automobile on Woodward avenue in said village (Highland Park), and when at a place approximately one mile south of the Six Mile road, and while upon the car tracks of the defendant company, said plaintiff's automobile came to a stop by reason of some temporary fault or defect in the machinery thereof. While plaintiff's agent and chauffeur was working upon said machine, in order to get the machinery running in such a manner that the automobile might be removed from the tracks of said defendant, and while he was so acting with due care and caution and without any contributory negligence on his part, said defendant, by its servants and employés, then and there on the 8th day of July, 1907, upon said highway, did so recklessly, carelessly, and negligently run, propel, and conduct its said motor car that by and through the said carelessness of said defendant * * * said motor car came upon and struck with great force and violence plaintiff's said automobile," greatly breaking and damaging the same, to the plaintiff's damage, etc.

The plea was the general issue. Upon the trial of said cause the plaintiff testified as follows:

"I have four children whose names are Ruth C. Newton, Charles W. R. Newton, J. Esther Newton, and Gilbert Newton. These children are minors. I am guardian of the estate of these children. As guardian of these children, I owned a certain Thomas touring car in 1907. It was bought on the 28th day of June, 1907, and I paid $2,625 for it."

On cross-examination the witness testified, among other things, as follows:

"*Q.* Did you own this automobile yourself, or did your children own it, Doctor?

"*A.* It was bought with guardian's funds.

"*The Court:* Well, then, it was the children's automobile.

"*A.* The children's automobile.

"*Q.* You personally have no interest in it?

"*A.* No interest in it. No."

Thereupon and thereafter certain evidence was given tending to prove that the automobile referred to was on

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said alleged day, through the negligence of the operatives of one of the defendant's cars, damaged and injured, and that the extent of said injury and damage represented by the cost of necessary repairs and the depreciation in the value of the automobile equaled or exceeded the amount of the verdict of the jury hereinafter referred to.

At the conclusion of the plaintiff's testimony, defendant moved the court for the direction of a verdict in favor of the defendant upon the ground that the declaration in the case was the declaration of Lumus C. Newton, personally, against the defendant, or that it is the declaration of Lumus C. Newton, guardian of certain minors, against the defendant, and that the proofs in the case showed that the machine, the injuries to which are sought to be recovered for herein, belongs to the minors above named. Said motion was overruled, and defendant duly excepted. The case was thereupon submitted to the jury, and a verdict for the plaintiff was found by them in the sum of $550 damages.

The same objection was urged by the defendant upon a motion for a new trial, which was denied, and the case is here upon a writ of error, the sole error assigned being that which was urged by defendant in its motion for a directed verdict, and that the court erred in not directing a verdict for defendant, and in not granting a new trial for the same reason. The question discussed by counsel for the respective parties is whether Lumus C. Newton either personally or as guardian of the minors was entitled to recover, the defendant claiming that he was not, and that the suit should have been brought by the minors by their next friend.

The plaintiff bases his case principally upon section 8718, 3 Comp. Laws, which reads as follows:

"Every such guardian shall also settle all accounts of the ward, and demand, sue for and receive all debts due to him, or may, with the approbation of the judge of probate, compound for the same, and give and discharge to the debtor, on receiving a fair and just dividend of his

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estate and effects; and he shall appear for and represent his ward, in all legal suits and proceedings, unless where another person is appointed for that purpose as guardian or next friend."

The plaintiff claims that under this statute there are at least two methods of bringing suit on behalf of minor wards—one by next friend, and the other by the general guardian appointed by the probate court.

In other States the practice does not appear to be uniform. In 15 Am. & Eng. Enc. Law (2d Ed.), p. 56, the rule is stated as follows:

"An infant usually brings suit by *prochein ami*, or next friend, but in many of the United States the general guardian is authorized by statute to bring suit without being appointed *prochein ami*. * * * If such suits concern merely the possession of the ward's property, the right to which is in the guardian, or, if they are upon contracts made by the guardian himself, they may be brought in the guardian's own name, but generally the guardian must sue in the name of the ward, and not in his own name."

In 21 Cyc. p. 190, it is said:

"A guardian may protect his ward's rights in personalty by suit, and he may maintain an action to recover possession thereof, or for damages for conversion thereof, or injury thereto; and he may enforce collection of debts and rents or hire due the ward"—citing, among other cases, *Norton* v. *Ohrns*, 67 Mich. 612 (35 N. W. 175).

In that case it was held that the guardian of a spendthrift might bring suit in his own name as guardian to recover personal property belonging to, or debts due, his ward under the statute. In *Carpenter* v. *Harris*, 51 Mich. 223 (16 N. W. 383), an action was brought by a guardian of an infant, as such, for forcible entry and detainer, and it was held that the action was properly brought. In *Reason* v. *Jones*, 119 Mich. 672 (78 N. W. 899), suit was brought by the general guardian of an incompetent person to set aside a deed. This court said:

"It is next urged that the general guardian of an in-

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competent person cannot maintain this suit, but that it can only be prosecuted by a guardian *ad litem*. 2 How. Stat. § 6316, confers upon such guardian the management of all his estate. Section 6323 provides that he may also bring suit for all debts, etc., and that 'he shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose as guardian or next friend.' We think the power thus conferred is broad enough to entitle a guardian to maintain a suit to recover property which his ward was incompetent to convey away"—citing *Norton* v. *Ohrns*, *supra;* and *Carpenter* v. *Harris*, *supra*.

In *Kinney* v. *Harrett*, 46 Mich. 87 (8 N. W. 708), it was held that a guardian by appointment is not authorized in this State to bring ejectment in his own name for lands owned by the ward, and the following reason was given by this court:

"If ejectment were purely a possessory action, there would be reason for holding that the guardian might sue in his own name. But in this State ejectment determines the title."

The court held, further, that where the ward's title is fully set forth in the declaration, and the guardian is only a nominal party, the objection to the pleading should be taken by demurrer, and that it is within the discretion of the court to permit an amendment. In *Morford* v. *Dieffenbacker*, 54 Mich. 593 (20 N. W. 600), which was also an action of ejectment, it was held that a declaration in the name of a guardian might be amended after the plea by making the ward the plaintiff suing by his next friend who was the guardian, and a number of earlier cases were cited in support of the right to so amend.

We are not prepared to hold that this action could not be brought in the name of Lumus C. Newton as guardian. If it is claimed that he did not sue *as guardian*, but in his own name, and that in using the word "guardian" he was simply describing his person, the declaration was certainly amendable. It was held in Wisconsin in *Plath* v. *Braunsdorff*, 40 Wis. 107, and in *Randall* v. *Lons-*

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torf, 126 Wis. 147 (105 N. W. 663, 3 L. R. A. [N. S.] 470), that an objection in an action by a guardian that the cause of action was one in favor of the ward alone and must be prosecuted by such ward should have been pleaded in abatement, and was unavailable to the defendant after having pleaded in bar. Under the following authorities, it would be the duty of this court to treat the amendment of the declaration, if one were necessary, as made here, as our statute of amendments is very liberal: *Wood* v. *Lenawee Circuit Judge*, 84 Mich. 521–524 (47 N. W. 1103); *Smith* v. *Pinney*, 86 Mich. 484–492 (49 N. W. 305); *Lockwood* v. *Insurance Co.*, 108 Mich. 334 (66 N. W. 229); *Smith* v. *Cowles*, 123 Mich. 4 (81 N. W. 916); *Enright* v. *Insurance Co.*, 91 Mich. 238 (51 N. W. 928); *Steers* v. *Holmes*, 79 Mich. 430 (44 N. W. 922); *Barber* v. *Smith*, 41 Mich. 138 (1 N. W. 992); *Johr* v. *St. Clair Supervisors*, 38 Mich. 532.

So in any view of the case which we are able to take, we agree with the circuit judge that substantial justice was reached by the verdict and judgment below, that there is no error in the record, and that the judgment below should be affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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BEAN v. BEAN.

1. PARTIES—EQUITY—MISJOINDER—PLEADING—WAIVER.
The claim that complainants having similar rights are improperly joined in a suit to restrain defendants from using a right of way over complainants' lands, is waived by the filing of a cross-bill in which defendants pray for relief against both complainants.

2. ADVERSE POSSESSION—EVIDENCE—EASEMENTS.
Evidence examined and *held* to show that complainants' grantor was the owner by adverse possession of a driveway 14 feet in width connecting his homestead with a farm held by him and afterwards conveyed by complainant to one of the defendants.

3. SAME—REAL PPOPERTY—COLOR OF TITLE.
Entry upon and possession of lands by a person as his own, even without color of right, is sufficient to start adverse possession.

4. SAME—STATUTE OF LIMITATIONS—PRESCRIPTION.
The right to and the use of a right of way may be acquired by adverse possession or prescription the same as title to the fee of the land.

5. SAME.
Possession and use of the strip of land, connecting two farms, without any permission from the owner, and sufficiently visible or notorious to raise the presumption of notice, is evidence of an adverse claim of title, although the driveway was never used for crops.

6. PARTIES—EASEMENTS—JUDGMENTS.
A decree in a suit to enjoin a trespass wherein defendants claim a right of way by prescription and ask affirmative relief by cross-bill, cannot affect rights of an adjoining proprietor who is not a party.

7. ADVERSE POSSESSION—LICENSE—RIGHT OF WAY.
Testimony showing that the owner of the land so used was unfriendly to the one using it, that the strip was fenced off and used exclusively by him for more than 15 years, and no one ever questioned his right to it, sufficiently shows a right by prescription, in the absence of evidence that the use was permissive or licensed.

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8. SAME—REQUIREMENTS.
Adverse possession must continue for the entire statutory period, and have been actual, open, visible, notorious, continuous, and hostile.

9. EASEMENTS—WAY OF NECESSITY—APPURTENANCES.
Where the grantor of lands, which have no access to a highway, owns the intervening realty, over which a right of way has existed to the highway, a way of necessity along the existing route, passes to the grantee.

10. SAME—VOLUNTARY GRANT.
An easement or way of necessity will pass by implication as well where the severance of dominant and servient estates is effected by legal proceedings as where the grant is voluntary, and it passes with each successive transfer of title.

11. SAME.
When the owner of an entire estate makes one part of it visibly dependent for the means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises.

12. SAME—EASEMENTS AND SERVITUDES.
Whether the grantor of the premises owns the passageway or has a right to its use by prescription, as an appurtenance to the dominant estate, the right passes with the grant.

13. SAME—WAY OF NECESSITY—TERMINATION.
An attempt to secure a passageway to the highway in another direction by agreement with an adjacent proprietor, does not defeat the way by necessity where the proposed new route proves to be impassable and worthless.

14. SAME—PLEADING—AMENDMENTS.
A prayer in defendants' cross-bill that the decree declare an easement to exist along the east side of complainants' property may be considered as amended so as to meet proof that a marsh obstructed the passageway and required that the route pass around it, and a decree may be entered accordingly.

Appeal from Jackson; Parkinson, J. Submitted October 28, 1910. (Docket No. 153.) Decided November 11, 1910.

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Bill by Elmore J. Bean and others against John C. Bean and others, to enjoin the use of an easement. From a decree for complainants, defendants appeal. Reversed.

Nathan E. Bailey (*Wilson & Cobb*, of counsel), for complainants.

Richard Price, for defendants.

STONE, J. The bill of complaint in this cause was filed solely to restrain the defendants from passing over the lands of complainants, owned by them in severalty, against the will of complainants, under a claim of right of way.

Complainant Elmore J. Bean is the owner in fee of the E. ½ of the S. E. ¼ of section 12, in town 3 S., range 2 W., being in the township of Spring Arbor. Complainant Leander McCain is the owner of the 80 acres of land immediately east of, and adjoining the complainant Bean's land, above described, to wit, the W. ½ of the S. W. ¼ of section 7, in town 3 S., range 1 W., being in Summit township. The defendants are owners of, or interested in, 66 acres of land in said township of Summit, directly south of, and adjoining, the 80 acres owned by complainant Leander McCain, which is described as the N. ½ of the W. ½ of the N. W. ¼ of section 18, in town 3 S., range 1 W. This 66 acres is often referred to by the witnesses as the "Benair Farm," or "Benair 66 acres," having been formerly owned by one Benair Bean. The land adjoining the land of complainant Elmore J. Bean on the south, and adjoining the defendants on the west, is owned by one Urania Bean, who is not a party to this suit.

As is not unusual, the section corners in the two townships do not correspond. The east and west section line in the township of Summit, between the lands of the complainant McCain and the defendants, is between 27 and 28 feet farther south than the section line in Spring Arbor, between the lines of the complainant Elmore J. Bean and Urania Bean, so that the homestead, the land of Elmore J. Bean, is not at any point nearer than 27 and

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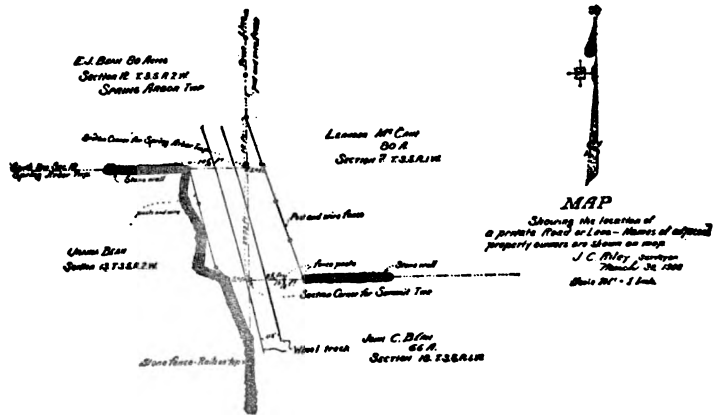
a fraction feet to the lands of defendants. A plat attached to the answer of defendants is shown in the record, and hereto attached.

Many years ago the said homestead of complainant Elmore J. Bean, with other lands in Spring Arbor, was owned by John Bean, grandfather of Elmore J. Bean, the north half of which was in 1848 conveyed to John H. Bean, the father of complainant Elmore J. Bean, and occupied by said John H. Bean as a homestead, and the south of said 80 was occupied by said John H. Bean as tenant until his father's death, in 1871, when he obtained



title thereto by the will of his father, and was by said John H. Bean owned and occupied to the time of his death, in 1901, when the complainant Elmore J. Bean acquired title by the will of his father. Complainant Elmore J. Bean has continued to own and occupy said 80 acres to the present time. The land now owned by complainant Leander McCain was wild land, and was at an early date owned by one Moses Bean, brother of John H. Bean, until 1879, when he sold it to his son, Ambrose Bean, one of the witnesses in this suit; who, in 1900, sold it to the complainant Leander McCain, who went into possession and has so continued to the present time. In the year 1853, John H. Bean acquired title to the 66 acres of

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land now owned by the defendants, which he continued to own and occupy to the time of his death, complainant Elmore J. Bean acquiring title thereto by the will of his father, and occupying the same, until, in the settlement of certain litigation growing out of the contest of the will of John H. Bean, who was also the father of defendant John C. Bean, on the 14th of March, 1907, he, Elmore J. Bean, conveyed said 66 acres to the defendant John C. Bean by ordinary warranty deed. As the 80 acres now owned by complainant Elmore J. Bean, and then occupied by John H. Bean as tenant, did not adjoin the said 66 acres, John H. Bean could not pass from one parcel to the other without passing over the land now owned by complainant McCain, or the land now owned by Urania Bean, or partially over both for a distance of nearly 28 feet.

The defendants answered the bill, admitting that they claimed the right to go across the premises of complainants, as alleged in the bill of complaint, and in that part of their answer in the nature of a cross-bill they set up a claim of ownership in fee, or to a right of way from the 66 acres through the narrow strip of land across the corner of complainant's land and Urania Bean's land, and along the east line of the land of complainant Elmore J. Bean to the highway, which runs east and west upon the north side of complainant's land. This they claim by adverse use and possession; and they claim that the same was passed as appurtenant to the 66 acres conveyed by the deed from complainant Elmore J. Bean to the defendant John C. Bean; and they set up the further claim that it was a way of necessity because of the conveyance of the 66 acres by Elmore J. Bean to the defendant John C. Bean in the settlement of said litigation.

Upon the hearing of this cause, some objection was made by the defendants to the alleged misjoinder of the complainants in this suit; but as the defendants in their answer have claimed the benefit of a cross-bill, and have asked for affirmative relief against both complainants,

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this objection was not seriously urged at the hearing in this court, and will not be considered. A large amount of testimony was taken in this cause before the circuit judge. We have examined this record with a great deal of care to endeavor to ascertain the true history of the matter involved. There appears to be some conflict in the testimony, but a careful examination shows that this conflict is more apparent than real. The circuit judge filed a written opinion in the case, and granted a decree to complainants in accordance with the prayer of the bill of complaint. The defendants have appealed.

Much weight should ordinarily be given to the opinion of the circuit judge, reached under such circumstances as here appear. It appears, however, from the opinion of the circuit judge, that his findings as to the facts were based largely upon notes taken by him at the hearing. We have examined the entire printed record. It is the claim of the defendants that the circuit judge misapprehended or misunderstood some of the testimony in the case. The vital question in this case is, in our judgment, that of adverse possession or prescriptive right. In his written opinion the circuit judge uses the following language referring to the testimony particularly of Ambrose Bean, who was the son of Moses Bean, and the grantor of complainant McCain:

"Ambrose says this north and south fence was straight, and he does not believe it swerved over at all on his father's side, although it might have done so a little. I think perhaps it did. But John H. Bean was not claiming the line between him and Moses, or between Urania and Moses, was crooked, and he may have deflected the fence a little to permit a more easy passage. But I feel quite confident he was not setting up any adverse claim, since after the death of Moses he intended to run his stone fence along the north line of the 66 acres to the quarter post, and move the stone on Urania's so as to afford room to drive, when Ambrose, who then owned the 80 to the east, came along and advised John H. to build the fence over to the east on him, and save moving the stone pile, refusing to sell the corner, but giving John H. the use of

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it, if he would fence it up, until he, Ambrose, should want to use it. He says he was to have the right to close it up any time he saw fit. He told John H. where to run the fence, and to keep it up and he might use the corner. At that time John H. made no sort of claim that he had already acquired a part of the corner on the 80 of Ambrose. He assented to the latter's proposition, and there is no evidence the parties considered anything else than the whole triangular parcel in the corner. I think John H. then recognized Ambrose as sole owner; and, if he had deflected the line fence at this end a little onto Ambrose, it was for his own convenience, without any design to claim a right or the ownership, or to deprive his brother Moses of any of his land. And, had Moses understood that John H. was actually encroaching for the purpose of appropriating land not his own, their relations were such that it may, perhaps, be inferred that Moses would have promptly interfered."

Counsel for defendants concedes that if the evidence in the case shows that John H. Bean, after the death of Moses, intended to run his stone fence along the north line of the 66 acres to the quarter post, as stated by the circuit judge in his opinion, that the decree of the circuit court upon the question of adverse possession was correct, but he insists that there is no testimony in the case to this effect, and that the circuit judge must have misunderstood the testimony when it was given, or that in the interim which elapsed between the hearing and the filing of the opinion he forgot it. We cannot undertake to quote all of the testimony in this case, but we do here refer to the testimony of Nolan S. Bean, a son of John H. Bean, who refers to the conversation between his father and Ambrose Bean, which is said to have occurred in the year 1884, as follows:

"I was 48 years old the 2d day of last September. I know where this property is that's in dispute here; have known it ever since I was old enough to recognize anything. I was born and raised there on the old homestead, the 80 acres. I was over 21 years old before I left home. * * * I know where this driveway is along the east side of the homestead 80. It has been there ever since I can remem-

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ber. I know where the passageway is, going from the 80 into the Benair farm; that has always been there as far as I know. I remember at one time building a stone wall on the east and west line between the Benair farm and what is now the farm of Leander McCain adjoining the passageway. That was 24 years ago this last June. I was working by the day at whatever I could get the most money at for my work. I built that wall for father. He came around by spells where I was working.

"*Q.* What was the surroundings of this neck going from the 80 into the Benair farm up to that time, what was there? What was there in the nature of a fence or stone wall, or anything of that kind?

"*A.* On the east side there was—from where this neck began to the north of the gate, there was a rail fence. My recollection is it was straight, made with posts and rails, straight as you could get a fence. On the west side of Urania Bean's there was a pile of stone in the corner next to the section, and as it went around further it was rails—as it went around further to the south towards the gate. That fence there on the east side of the passageway had been there several years. I couldn't tell how long.

"*Q.* Who used that passageway, who used and controlled it, and had apparent ownership of it?

"*A.* Father did.

"*Q.* State whether or not there was any difference in his use of that passageway from his use of the rest of his land.

"*A.* I never had any reason to think there was.

"*Q.* It was fenced off and he used it?

"*A.* Yes, sir.

"*Q.* On this day, or any time when you were building that stone wall, you may state whether or not you overheard any conversation, or had any conversation, between your father and Ambrose Bean, whether you overheard any between those two, or had any with Ambrose yourself concerning that piece of land and the fence there.

"*A.* I guess you would have to call it overheard.

"*Q.* All right, call it anything you please.

"*A.* Ambrose made the suggestion to move the fence from where it was—it was getting pretty poor—to a tree that was there that set on Ambrose's line, near the line, run it south and come out—my recollection—about eight feet east of the gate where the old fence was.

"*Q.* (Showing witness paper): Whereabouts was this

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tree that Ambrose suggested you run the fence to, whether it was to the north end or south end?

"*A.* North end.

"*Q.* Of the passageway?

"*A.* Yes.

"*Q.* There was a tree there, and he suggested to run the fence from that, south so it came about eight feet east of where the old fence was?

"*A.* Yes, sir.

"*Q.* What was said? Just tell us what was said there.

"*A.* I couldn't do it.

"*Q.* Tell us as near as you can what Ambrose said, and how he came to say it.

"*A.* How he came to say it I don't know. I was at work there at the wall—building the wall—and was calculating to run it *up to the end of the gate.*

"*Q.* Run it around to the end of the gate?

"*A.* Yes, east to where the old fence is. I was nearly there at that time, nearly up to where this old fence was. What he done it for I don't know.

"*Q.* Tell us what he said, if you can remember, the substance of it.

"*A.* The substance was to move it back there and give us a better driveway through, more room.

"*Q.* Was your father there at the time?

"*A.* Yes, sir; he was talking to him; probably to both of us.

"*Q.* How wide was that passageway when the old fence was there, how much of a driveway was there through there?

"*A.* Well, I should judge there was about 16 feet. I never measured it.

"*Q.* State whether or not there was plenty of room to drive through there before this fence was moved back.

"*A.* Yes, sir; there was. We were intending to run this stone wall until we came to the east end of the old gate. We moved the fence over east. It would be my judgment we moved it about 8 feet on the south end east of the gate, and about 16 feet on the north. It's a good while ago. At that time there was a big butt of a tree stood there about the same width from the gate where Urania Bean stopped. I am speaking of the north section corner. This butt of the tree set in there for a post, and the old fence came up to that at that time. I should judge it was probably 16 feet wide, about the width of the gate.

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I should think the passageway was about 16 feet wide at the north end as well as at the south end; that is according to my judgment.

"*Q.* This stone wall that runs along the line between Urania Bean and the homestead 80 and then turns around here on the passageway, was that there at that time?

"*A.* There was no stone wall, just stone drawed in there in a big pile and throwed in there.

"*Q.* Did they extend around as it does now?

"*A.* I don't know how it extends now.

"*Q.* You can see it on the map here.

"*A.* It came around a pace, and then I should say there was three or four lengths, maybe five lengths of rails to finish it up on the east and west wall between the Benair place—the north and south wall between the Benair place and Urania Bean's.

"*Q.* Was there anything said in that conversation, Mr. Bean, about your father buying that corner from Ambrose, or Ambrose selling it to him, or anything of that kind?

"*A.* I didn't hear anything. They weren't with me all the time. They went away after awhile. I couldn't say that they went away together."

"*Q.* Was there anything said about Ambrose moving that fence back if you didn't keep the fence up, or whenever he wanted to, or anything of that kind?

"*A.* Not that I heard.

"*Q.* Did your father make any request of him to give him any more land, or to sell him any more land at all in your presence at that time?

"*A.* Nothing that I heard. I would have heard it if he had. When I first saw this old fence on the east side of the passageway, it extended down south, and also over to the north, clear to the highway. It was woods on Ambrose's side. Father had cleared the timber and pastured. After father acquired the Benair farm, he tilled it the same as he did the rest of his place. I don't remember whether there was any of it cleared when he first bought it. I should think there must have been. There was a house on it at least, in my first remembrance. At the time I was building this stone wall some of the Benair farm was cleared and under tillage. Father owned it and was tilling it, and he had been going back and forth in there, tilling that farm, either he or his men, ever since I could remember."

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Being further interrogated, on cross-examination, this witness said:

"My idea was to leave the old fence next to Ambrose as it was, and then widen it out on the west side. That was father's idea."

Defendants' counsel contends that the above-quoted testimony corresponds with the testimony of John C. Bean, Sinkler Bean, and every other witness in the case who gave any testimony touching this point. He further claims it is not contradicted in the least, but rather corroborated by Ambrose Bean, the main witness for complainants, who testified that, prior to the time the fence was moved over to the east, John H. Bean had a passageway there which "he took." This same witness testified as follows:

"*Q.* I want to get the whole thing. This passageway you say Mr. John H. Bean took—

"*A.* (Interrupting). That I gave him?

"*Q.* You didn't give him anything before the time you are talking about?

"*A.* No.

"*Q.* He took it?

"*A.* Yes.

"*Q.* That's the idea. That passageway which he took and which he had before you gave him anything, was the passageway running between the stone pile you are talking about and the fence on the east side?

"*A.* Yes, sir. You have got me.

"*Q.* And the passageway was how wide, do you think?

"*A.* I should say it was nearly a rod.

"*Q.* When you came along there, Nolan was building this fence, and his father was there, they were also going to repair this old fence?

"*A.* I could not tell you that.

"*Q.* Was there room between the fence and the stone pile (next to Urania Bean's) to drive through?

"*A.* Before I gave him this piece?

"*Q.* Yes.

"*A.* He did drive through there.

"*Q.* Are you sure that old fence as it came up on the section line continued straight north to the other—I should say straight south—or did it swerve over some?

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"*A.* I couldn't tell you.
"*Q.* It might have swerved over some?
"*A.* It might a trifle; yes.
"*Q.* So he would have room between this stone pile?
"*A.* He might have laid it over there.
"*Q.* That is what he took before that?
"*A.* Yes."

It is the further claim of defendants' counsel that it appears by the testimony of the witnesses on both sides of the case that a fence had been maintained on the east side of this passageway for years before this shift was made in 1884. John G. Bean, a son of Urania Bean, testified that he lived in Spring Arbor most of his life, about 26 years. He testified as follows:

"I know where this driveway is in question between the Benair farm and the old homestead at the southeast corner. I couldn't tell how long that has been there. It has been there as long as I can remember.

"*Q.* Who has used that driveway and had possession of it, and control of it as long as you can remember?

"*A.* I suppose Uncle John and the rest of them there have used it. The people on the place, his estate has, and him, I think. I have been around my mother's farm a good share of the time ever since I was born. During all that time this passageway between the two farms has been fenced on each side. There has been a gate going into the Benair farm.

"*Q.* Who had control of that all of this time?

"*A.* Uncle John did, I suppose, and the people that ran it.

"*Q.* Has anybody else, at any time, to your knowledge, made claim to that passageway until this suit was begun?

"*A.* Not that I know of.

"*Q.* State whether or not John H. Bean used it and exercised dominion over it the same as he did the rest of his farm, so far as anybody could observe.

"*A.* I think he did to all appearances.

"*Q.* State whether or not it was plain to any one who had occasion to inquire into, or got over there into that vicinity at all, to see that John H. Bean was using and possessing that neck of land in connection with the rest of his farm.

"*A.* Yes, sir; I think it was."

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The witness Ambrose Bean was one of the main witnesses for complainants, and had at one time been the owner of the McCain farm. What he says, therefore, upon this subject of the old way having been there, is somewhat significant, and we quote a little further from his testimony:

"*Q.* At the time you came along there and found Nolan building this stone wall, there was then and had been before this a fence running along the east side of that neck of land separating it from this 80, was there not?

"*A.* Between John Bean and me?

"*Q.* Yes.

"*A.* Yes, sir; clear through. * * *

"*Q.* As it went south, did it go clear up to the point where this stone wall was between the Benair property and yours?

"*A.* That was the calculation. He might have throwed it off a little there.

"*The Court:* It did go up to there?

"*A.* That's what I suppose.

"*Q.* There was an old fence there?

"*A.* Yes, sir.

"*Q.* Running clear up to the point of the old wall?

"*A.* Yes, sir. * * *

"*Q.* How wide a passageway was there in which to drive through from the homestead 80—you know what I mean?

"*A.* Yes, sir.

"*Q* Over onto the 66 acres, how much of a passageway was there before he moved that fence?

"*A.* There was no particular passageway only as he took it.

"*Q.* That may be. I am not finding fault with that. How much of a passageway did he take there?

"*A.* It might have been two rods, and it might not have been two rods. * * *

"*Q.* I want to get the whole thing. This passageway you say Mr. John H. Bean took—

"*A.* (Interrupting). That I gave him?

"*Q.* You didn't give him anything before the time you are talking about?

"*A.* No.

"*Q.* He took it?

"*A.* Yes.

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"*Q.* That's the idea. That passageway which he took, and which he had before you gave him anything, was a passageway running between this stone pile you are talking about and the fence on the east side?

"*A.* Yes, sir. You have got me.

"*Q.* And that passageway was how wide, do you think?

"*A.* I should say it was nearly a rod * * * It was wide enough for a load of hay to go through. That is pretty near 16 feet. * * *

"*Q.* So your father and John H. Bean were not on the very best of terms?

"*A.* They were not.

"*Q.* It ain't very likely your father would make any concessions to him, or John would make any concessions to him?

"*A.* No; he wouldn't. * * *

"*Q.* On the east side of that stone pile—the stone pile next to Urania Bean—he had room enough to get out with a load of hay?

"*A.* Yes, sir.

"*Q.* You have no idea he ever did that with your father's permission?

"*A.* I know well enough he didn't. * * *

"*Q.* Did you regard the old fence that was there as the line fence?

"*A.* It was all the fence there was there.

"*Q.* You regarded it as the line?

"*A.* Yes, sir.

"*Q.* John H. Bean regarded it as the line, too?

"*A.* Yes, sir.

"*Q.* He drove along up side of that on the west side and went in between that and the stone pile with a load of hay?

"*A.* There was a little hole in there. He could, in that shape, right through that little hole. Call it what you are a mind to. * * *

"*Q.* You didn't tell John H. Bean, at that time when you went up there and found this fence was moved, he was occupying any of your land?

"*A.* I did not.

"*Q.* He didn't tell you he was?

"*A.* He did not.

"*Q.* Whatever land he had there at that time he had used it as his own just the same as he did anything else?

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"*A.* He did.
"*Q.* Anybody could see, who was at all interested, up to that time, that John H. Bean was in possession of that land?
"*A.* The hole he went through.
"*Q.* Drove right through?
"*A.* Yes.
"*Q.* There was no concealment about it?
"*A.* No concealment whatever.
"*Q.* He had used that for years and years?
"*A.* He must have went through the place ever since he bought the place until that time.
"*Q.* That was in 1853?
"*A.* I don't know when that was."

Fred R. Bean, another son of Urania, 40 years of age, who had always lived on the farm with his mother, testified that a driveway had been there as long as he could remember.

The defendant John C. Bean testified that he helped draw the rails. He and Sinkler and their father, John H. Bean, laid the fence up on the east side of the passageway about 45 years ago; that this was done the time the fence was built along the township line. He testifies that he should think there were about 12 feet of passageway along the north end of the quarter, and about the same at the south.

Sinkler Bean, another son of John H. Bean, remembers helping John draw the rails to fence on the east side of this passageway along the town line. This he testifies was built at the time that Moses and John H. Bean had divided the line fence between the two 80's, John H. taking the south end, and Moses the north. He testified that the fence was built with rails, an ordinary worm fence, until they got near a post standing opposite the northeast corner of Urania Bean's property, and that then they went east of this post, and then swerved off to the east until they got up to the section line between the Benair farm and Moses Bean's farm, that there was stone and a rail fence on the west side at that time, and that they first used a pair of bars to go into the Benair farm, and subse-

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quently a gate was built. He also testified that the fence remained there in the same condition until about the year 1883, when the rail fence was taken down and a barb-wire fence was substituted for it a few feet farther east. The following questions and answers are pertinent:

"*Q.* When you fenced this neck of land at the time you have spoken of first, how wide a passageway was there through there between this fence and the east side of that neck of land?

"*A.* Well, sir, I should have to approximate it. I know we drew hay and wheat in the bundle through there, and went through with everything of machines about, on our farm at least. I should think it was anywhere from 14 to 16 feet, possibly more.

"*The Court:* At the time you helped build the fence there, your father built that and you drew the stuff. When you reached that first section post, then you swerved a little onto Moses?

"*A.* Yes, sir.

"*Q.* How did you come to do that?

"*A.* I don't know. We done it, that's all I know about it.

"*Q.* Was there any talk between your father and Moses that he might do it, that you heard?

"*A.* I don't think Moses was there at all. I never heard any reference.

"*Mr. Price:* That post he is referring to there, the court called it a section post, and so did Mr. Wilson, but neither of them have called it a section post. Tell us about it.

"*A.* That post I think was set east of the town line, a little, and directly east from the section line — Urania's north line * * *

"*Q.* From that time to the present, down to the time this litigation was commenced, who controlled, owned, operated, and exercised dominion over this driveway and neck of land?

"*A.* I should consider father did. I never heard anybody else make any claim about it. I never heard any remark about ownership or any other—or any disputed right to it at all, or any discussion from anybody. * * * I looked upon it as a right of way belonging to father; had no thought of anything else except it was our own right of way to go between these pieces of land. It never

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was called to my mind at all. * * * The last time I was there I could see no difference, no change of the wagon tracks from what they had always been."

The undisputed evidence of the witnesses is that the wagon tracks straddled, as they say, the south section corner, about as the wagon tracks or wheel tracks are indicated upon the diagram.

Upon examining the mass of testimony in the case, we are impressed with the claim of the defendants that by a clear preponderance of the evidence it appears that at least 14 feet in width of the neck of land constituting the driveway connecting the homestead 80 with the Benair farm was owned absolutely by John H. Bean at the time of his death. This excludes the 4 or 5 feet in width on the east side, which, under the testimony of Nolan and Ambrose Bean, might be said to be held by John H. Bean under a license, or permission, given at the time the fence on the eastern side was shifted over. We are of opinion that this claim of defendants is supported by a preponderance of the evidence, and that John H. Bean was the owner of the same by adverse possession of more than 15 years. It is true he had never cultivated this strip, but he had used it as a passageway between the homestead 80, all of which he had owned since 1871 (and the north half of which he had owned since 1848, and the south half of which he had cultivated as a tenant during the intervening years) and the Benair farm which he had owned since 1853. He had no color of right there, but the entry upon and possession of lands by a person as his own are enough to start adverse possession. He "took it," as Ambrose testified, and that without any permission from him or any one.

The right to and the use of the right of way may be acquired by adverse possession or prescription the same as title to the fee of the land. In Tiedeman on Real Property, at section 497, it is said:

"As a general proposition, any acts of ownership, exercised by the wrongdoer which would make his possession

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sufficiently visible and notorious, as to raise the presumption of notice to the owner of such adverse holding, will be ample evidence of the adverse claim of title, and actual notice to the owner or any express claim or affirmation of such claim of title is not required to establish its existence."

Applying that rule to this case, it must be said that the possession of John H. Bean of the neck of land connecting the two farms was adverse to all the world, and had ripened into a title before the fence was shifted to the east, as explained in the testimony referred to. The possession of a lane thus connecting two pieces of land, used as a passageway, may ripen into title, the same as though it had been cropped. We are unable to find any evidence in the record that John H. Bean ever asked or obtained permission from anybody to thus appropriate the strip of land.

As to that portion of this strip of land which is taken from the premises of Urania Bean, she not being a party here, her rights cannot be affected by the decree in this case. It will be borne in mind that complainants in their bill of complaint allege than John H. Bean during his lifetime passed and repassed over this strip of land, but they claim it was under a license of the owner. We think they have failed to prove this, and that the contrary appears. It appears that John H. Bean and Moses Bean were not on friendly terms. It is shown that more than 45 years ago the fence was built, and this neck of land passed into the possession of John H. Bean, who continued to use it exclusively, and no one ever questioned his right to it in any way. *Sanscrainte* v. *Torongo*, 87 Mich. 69–83 (49 N. W. 497); *Ward* v. *Nestell*, 113 Mich. 185–189 (71 N. W. 593); *Greene* v. *Anglemire*, 77 Mich. 168–171 (43 N. W. 772). All of the authorities agree that the adverse possession must have been for the whole period prescribed by statute, actual, open, visible, notorious, continuous, and hostile. We think that the evidence brings the case within that rule.

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It appearing that when on March 14, 1907, complainant Elmore J. Bean conveyed the 66 acres to John C. Bean, said Elmore J. Bean was the owner through the will of his father of the homestead and the 66 acres, and also of the said strip of land, the defendants are in a position to claim said strip of land both as a way of necessity, and as appurtenant to the 66 acres. The rule that an easement or way by necessity will pass by implication, as well where the severance of the dominant and servient estates is effected by legal proceedings, as where the grant is voluntary, is generally recognized. The way of necessity passes with each successive transfer of the title, whether voluntary or involuntary. *Proudfoot* v. *Saffle*, 62 W. Va. 51 (57 S. E. 256, 12 L. R. A. [N. S.] 482); *Morgan* v. *Meuth*, 60 Mich. 238 (27 N. W. 509); *Lathrop* v. *Elsner*, 93 Mich. 599 (53 N. W. 791); *Ann Arbor Fruit, etc., Co.* v. *Railroad Co.*, 136 Mich. 599 (99 N. W. 869, 66 L. R. A. 431). When the owner of an entire estate makes one part of it visibly dependent for the means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises. *National Exchange Bank* v. *Cunningham*, 46 Ohio St. 575 (22 N. E. 924).

Complainants' counsel contend, however, that:

"As there never was any unity of ownership of the McCain strip and the other land, it cannot be burdened with the way of necessity by any act of complainant Bean."

But we have shown that there was unity of ownership in John H. Bean. This strip of land between the two farms became the absolute property of John H. Bean by adverse possession. And this is virtually conceded by complainants' counsel, unless the evidence shows that

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John H. Bean's possession of this land was by permission or license. It should be borne in mind that by this record complainant Elmore J. Bean took all this property, including this strip, under his father's will, as residuary legatee. He owned whatever his father, John H. Bean, owned, that had not been otherwise disposed of. But, if we were to hold that there was no unity of title, it would not follow that a way of necessity would not arise. A right of way can be acquired by prescription, or adverse possession, the same as title to the fee. If John H. Bean did not absolutely own this passageway between the two farms, he at least had acquired a right of way over it, which became appurtenant to the 66 acres, and all belonging to Elmore J. Bean, it passed with the deed from Elmore to John. In fact, it appears from the testimony of Elmore that it was not until after the making of the deed to John that he made up his mind to exclude him from this means of getting to his farm.

We cannot agree with complainants' counsel that the right of way by necessity ceased when John C. Bean made his agreement with McGonegal. The testimony shows that McGonegal's land is impassable, and, as a passageway, was worthless to the defendant John C. Bean. True, he acquired a right to go south over McGonegal's land, but he found it marshy and impassable.

In their prayer for relief in their cross-bill, defendants pray that the court decree that they have a right to an easement and right of way along the east side of said 80-acre farm owned by said Elmore J. Bean to the highway on the north, and through said neck of land to get to, and from, the said 66-acre farm, and as appurtenant thereto. From the evidence it appears that a marsh prevents passage along the entire east side of said farm, but that the usual traveled route is around said marsh. We think that the answer should be treated as amended to correspond with the evidence in that regard, and, as so amended, that the defendants should have the relief prayed for in their cross-bill, the width of such passageway to be 14 feet

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over said south section corner, the center of the wheel track over said strip to be the center of said route.

The decree below will be reversed, and a decree entered here in accordance with this opinion, said defendants to recover their costs in both courts.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

DESPRES, BRIDGES & NOEL v. ZIERLEYN.

1. CONSTITUTIONAL LAW — COMMERCE — INTERSTATE COMMERCE — FOREIGN CORPORATIONS.

   A foreign corporation is entitled to recover, without showing that it has complied with the statute regulating local business, for goods sent into the State upon orders given by mail at its business office located in the State of its residence, since they constituted interstate commerce. Act No. 206, Pub. Acts 1901; Act No. 84, Pub. Acts 1903; Act No. 310, Pub. Acts 1907.

2. SAME—FOREIGN CORPORATIONS—INTERSTATE COMMERCE.

   The selling of jewelry by salesmen of a foreign corporation, who carry goods in trunks, and exhibit them to customers that select the goods from the stock carried, is not interstate commerce.

3. SAME—STATUTES.

   Contracts so made are unenforceable under Act No. 34, Pub. Acts 1903, unless such corporation has complied with the regulations of the statute.

4. SAME—REPEAL OF STATUTE—CONTRACTS OF FOREIGN CORPORATIONS.

   Nor did the amendment of the statute by Act No. 310, Pub. Acts 1907, so repeal the prohibition that contracts made during the time when the act of 1903 was in force could be en-

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forced after the amendment; as the amendment is not a curative act, containing no repealing clause, and the provision in question was not in the nature of a penalty. BIRD, C. J., and HOOKER and BROOKE, JJ., dissenting.

5. SAME.

While contracts made in violation of law are void, where the legislature has imposed a penalty for the infraction of it, the penalty excludes any implication of an additional penalty.

6. PLEADING—DEFENSES—NOTICE—UNLAWFUL CONTRACTS.

The defense that a contract was in violation of the statute (2 Comp. Laws, § 5324) prohibiting the sale of goods by peddlers without a license, must be pleaded by a special notice under the general issue.

Error to the superior court of Grand Rapids; Stuart, J. Submitted June 23, 1910. (Docket No. 69.) Decided December 7, 1910.

Assumpsit by Despres, Bridges & Noel, a foreign corporation, against Antoni Zierleyn and Anthony B. Zierleyn for goods sold. Judgment for plaintiff and defendants bring error. Reversed.

Dunham & Phelps, for appellants.

Bundy, Travis & Merrick, for appellee.

BIRD, C. J. Plaintiff brought this suit in assumpsit, against the defendants, to recover upon a promissory note and an open account. The jury awarded plaintiff the full amount of its claim, and the defendants assign error.

The plaintiff is a foreign corporation and is engaged in the wholesale jewelry business in the city of Chicago. The defendants are retail dealers, doing business in the city of Grand Rapids, in this State. The defendants have been customers of the plaintiff for several years. Plaintiff's usual method of calling on its customers in Michigan, including the defendants, was for its agents to carry their stock in trunks and to allow their customers to select therefrom such goods as they desired, and deliver them

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from the trunks. In case the customers desired any goods not carried in the trunks, their orders were taken and forwarded to the Chicago house, and the goods were sent from there direct to the customers. At the time suit was begun, defendants were owing plaintiff for 28 separate invoices of goods, aggregating the sum of $473.19. These invoices were furnished to the defendants between the 10th day of July and the 25th day of November, 1907, and it was claimed by plaintiff that all of the invoices, save one of $360.79, were mail orders. On February 17, 1908, a 30-day promissory note of $148.28 was given by the defendants to apply on the invoices. When the note became due, suit was begun on it and on the open account. A bill of particulars was filed showing the said invoices and the date of each item.

The defense made to this action was that the plaintiff was a foreign corporation and that in disposing of these goods it was doing business within the State of Michigan in violation of Act No. 34, Pub. Acts 1903, which required foreign corporations, as a condition precedent to maintaining any action in this State, upon any contract, to file its articles of association with the secretary of State and pay its franchise fee. And also that the plaintiff was doing business in violation of Act No. 310, Public Acts 1907, which superseded Act No. 34 and declared void all contracts of a foreign corporation which were made prior to a compliance therewith. The jury found for the plaintiff in the sum of $473.19; the same being the amount of its entire claim.

Most of the assignments of error are based upon the following instructions to the jury:

"I instruct you that you may give a verdict for all of the sales and amounts in the bill of particulars found to be due up to September 28, 1907, which plaintiff claims amounts to $412.81, and I do not recall that the items of that bill of particulars were disputed, but that is a question of fact for you to determine. Now, after that date, September 28th, there were a few other sales; little items

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of $2, $3, $5, and $9, up to the last of November, amounting to some $60.38, that they would be entitled to recover for if they were orders sent to Chicago from home and the orders filled by sending the goods back from Chicago. That is what is called interstate commerce."

The court was right in charging the jury that the plaintiff would be entitled to recover for all goods that were ordered from the Chicago house, and sent from there to the defendants at Grand Rapids. That was clearly interstate commerce. *Coit & Co.* v. *Sutton*, 102 Mich. 324 (60 N. W. 690, 25 L. R. A. 819).

The court held that the balance of the bill, $412.81, which was contracted while Act No. 34 was in effect, was in violation of that act, but that a recovery could now be had because that act had been repealed and ceased to have any effect on the 28th day of September, 1907. We agree with the trial court in his view of the law that selling and delivering goods from trunks in the manner disclosed in this case was not interstate commerce. The selling of goods, as conducted by the plaintiff, was not the doing of a single act of business by a foreign corporation in the domestic State, because plaintiff was not only selling goods to defendants, but to other customers, and not once but several times a year. It was not the case of a foreign corporation shipping goods in an original package to the domestic State, because these goods were brought into the State in bulk, to be sold by its agents, in such quantities as the purchaser desired. It was not the case of a sale of goods by sample, in the domestic State, by a foreign corporation, through itinerant salesmen, because the goods were not only sold, but were delivered at the same time. It was not the case of a foreign corporation placing its goods in the hands of a local merchant, to be sold on commission; but it was a case of a foreign corporation coming into this State, by its agents, who brought with them a small stock of goods, with the expectation that their customers would purchase them. The goods were brought into the State in bulk and became a

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part of the mass of the property of this State as soon as they arrived and were offered for sale. The exhibition of them, the offer to sell, the sale, and the delivery of the goods, all took place within this State. Tested by the rules by which it is usually determined whether commerce is interstate, none of them brings plaintiff's methods of selling goods within the protection of interstate commerce. *Emert* v. *Missouri*, 156 U. S. 296 (15 Sup. Ct. 367); *City of Muskegon* v. *Hanes*, 149 Mich. 460 (112 N. W. 1077); *People* v. *Smith*, 147 Mich. 391 (110 N. W. 1102); *City of Muskegon* v. *Zeeryp*, 134 Mich. 181 (96 N. W. 502).

Was plaintiff entitled to recover for goods sold in violation of Act No. 34, after that act was repealed? This depends upon the construction of the act. Act No. 34, Pub. Acts 1903, provided in part:

"No foreign corporation, subject to the provisions of this act, shall maintain any action in this State, upon any contract made by it in this State, after the taking effect of this act, until it shall have fully complied with the requirements of this act, and procured a certificate to that effect from the secretary of State."

Act No. 310, Pub. Acts 1907, provides, in part, as follows:

"No foreign corporation subject to the provisions of this act shall be capable of making a valid contract in this State until it shall have fully complied with the requirements of this act, and at the time hold an unrevoked certificate to that effect from the secretary of State."

The effect of Act No. 34 upon contracts made in violation thereof was considered in *Hastings Industrial Co.* v. *Moran*, 143 Mich. 679 (107 N. W. 706), and *Neyens* v. *Worthington*, 150 Mich. 580 (114 N. W. 404, 18 L. R. A. [N. S.] 142), and it is held in those cases that the contract was not void, but the right of enforcement was suspended until compliance with the act. If we say, as we must under the construction placed upon Act No. 34 by these cases, that the contract was not void, but the right of enforcement merely suspended, I think it follows

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that, when that act was repealed, the plaintiff would have the same right to enforce the contract that it would have had if no such law had ever been passed. The repeal of the penalty imposed by the statute pardoned all past offenses against it. *Wharton* v. *State*, 45 Tenn. 1 (94 Am. Dec. 214). It would be different, however, under Act No. 310, which went into effect on September 28, 1907. Contracts made after that date would never have any validity, and there could be no recovery on them, unless they grew out of transactions which were interstate commerce. The court left it to the jury to determine whether the items which were purchased after Act No. 310 went into effect were mail orders, and, as the jury found for the plaintiff for the full amount of his claim, we must assume they so found. We think the court took the right view of the law, and there was no error in this instruction.

Counsel for appellant contend that, even though the penalty imposed by Act No. 34 has been repealed, the contract in question is void because Acts Nos. 34 and 310 declared unlawful the carrying on of business in this State by noncomplying foreign corporations. This claim is based upon the general rule of law that contracts made in violation of law are void. Counsel overlooks the exception to that rule, which provides that, where the legislature has imposed a penalty for the infraction of a statute, the penalty so provided is exclusive of any other; at least, no other can be implied. 13 Am. & Eng. Enc. Law, p. 876; *La France Fire Engine Co.* v. *Town of Mt. Vernon*, 9 Wash. 142 (37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827); *Toledo Tie & Lumber Co.* v. *Thomas*, 33 W. Va. 566 (11 S. E. 37, 25 Am. St. Rep. 925); 2 Morawetz on Corporations, §§ 662–666; *Clay, etc., Ins. Co.* v. *Manufacturing Co.*, 31 Mich. 346.

The trial court instructed the jury that the promissory note sued upon was void, and that no recovery could be had thereon, but that the consideration for the note was valid, and it should be treated as a part of the account, the same as though the note had never been given. We

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see no error in this instruction. The consideration for the note passed to the defendants while Act No. 34 was in force, which permitted a valid contract to be made, while the note was not executed until after Act No. 310 had taken effect.

Appellants also insist that a verdict should have been directed for the defendants because the plaintiff was doing business contrary to section 5324, 2 Comp. Laws, which is known as the peddlers' law. The appellee makes the point that no notice of that defense was given in the pleadings. We are unable to find any in the record. That is a defense which would require a special plea or a notice under the general issue before it could be raised in the trial court. This was not given, and we do not think the question is properly before the court, and therefore shall refrain from discussing it.

The judgment of the trial court should be affirmed.

OSTRANDER, J. I concur in the opinion of the Chief Justice, except in the conclusion which he reaches with respect to the right of the plaintiff to recover for goods sold in violation of Act No. 206, Pub. Acts 1901, as amended by Act No. 34, Pub. Acts 1903 (later amended by Act No. 310, Pub. Acts 1907). These contracts were not enforceable, not because they were absolutely void, but because they were prohibited, and because the legislature had said they should not be enforced except upon a condition which the plaintiff has never performed. They were void so far as the right of the corporation to enforce them is concerned. *Clay, etc., Ins. Co.* v. *Manufacturing Co.*, 31 Mich. 346; *Showen* v. *J. L. Owens Co.*, 158 Mich. 321 (122 N. W. 640, 133 Am. St. Rep. 376); *Kuennan* v. *Fidelity & Guaranty Co.*, 159 Mich. 122 (123 N. W. 799). They were prohibited when made and are now. They were not enforceable by the offending corporation when made and are not now, unless, as the Chief Justice finds, the act of 1907, which affects only contracts thereafter made, by omitting the provision for enforce-

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ment upon condition and supplying something in its place, has validated them. In terms the act of 1907 is clearly not a curative act with respect to existing but prohibited contracts. The act contains no repealing clause. And the denial of the right to enforce contracts contained in the acts of 1901 and 1903 is not a penalty. Each act expressly provides a penalty for its violation, and these penal provisions were considered in *People* v. *Steel Co.*, 150 Mich. 563 (114 N. W. 350). Treating the disability to enforce as a penalty, there is no reason for saying that it was removed by an amendment, prospective in its operation, which denies the right of nonconforming corporations to make a valid contract in the State.

The court below was in error in permitting a recovery for any goods sold in violation of the statute, and the judgment must be reversed, with the right to a new trial.

MOORE, MCALVAY, BLAIR, and STONE, JJ., concurred with OSTRANDER, J.

HOOKER, J. I concur with the Chief Justice. Without questioning the general rule that a contract, the making of which is prohibited by law, is void, and cannot be made valid by subsequent legislation merely, I am of the opinion that the rule does not apply to contracts made in violation of the provisions of Act No. 34, Pub. Acts 1903, for the reason that a proper construction of that act justifies the inference that the legislature intended that such contracts should not be void, but only that a right to enforce the same should be suspended, so far as the offending corporation is concerned. This question was discussed, and so held, in *Hastings Industrial Co.* v. *Moran*, 143 Mich. 679 (107 N. W. 706). It will be noticed that, under this construction, there is no impediment to an action against a corporation, on such a contract, by the other party, which there would be if such contract were to be held null and void. Such a holding would not only be inconsistent with such a recovery, but it would render the provision against maintaining an action until articles

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should be filed and the fee paid, etc., superfluous. We must assume that it was intended to give a corporation a right to maintain an action upon such a contract after compliance with the law, and we are convinced that the design was not to embarrass parties who should deal with such corporations in ignorance of their failure to comply with the law, in relation to their right to do business in this State. Any other rule would make it necessary for all persons to ascertain about this, before contracting.

The argument may be made that Act No. 34 prescribed the only condition upon which a corporation may be allowed to recover. This might be true were we to hold the contract void. Under the construction herein adopted, this is not the case. The contract is always valid, and one party is in no way denied relief upon it at any time; the other is until compliance with the conditions imposed. By the amendment (Act No. 310, Pub. Acts 1903) the restriction contained in Act No. 34 was removed; the provision under discussion being omitted from the amended section. There is now no impediment to an action, as the provisions of Act No. 310 cannot apply to pre-existing contracts.

The judgment should be affirmed.

BROOKE, J., concurred with HOOKER, J.

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WEINBERG v. STRATTON.

1. ASSIGNMENTS—PAYMENT—DEBTOR AND CREDITOR—EVIDENCE—HEARSAY.

Where a debtor delivered to his creditor an order on his employer to pay his wages to the creditor until further notice, and after the creditor had received a part of his claim, the debtor gave notice that he withdrew the order, and the creditor, learning of the attempted withdrawal of the assignment, notified the employer of the amount of his claim; evidence was admissible to show conversation constituting the alleged assignment, which, it was claimed, included future earnings up to the amount of plaintiff's claim, although the defendant was not present at the time, and received no information concerning it except the notice.

2. SAME.

While any payments made by the employer to the debtor before the notice were valid, he would be liable for amounts paid after he received notice of the extent of plaintiff's claim under the assignment.

Error to Cheboygan; Shepherd, J. Submitted June 23, 1910. (Docket No. 136.) Decided December 7, 1910.

Assumpsit by Max H. Weinberg against De Forest A. Stratton upon an assignment of indebtedness. Judgment for defendant and plaintiff brings error. Reversed.

M. W. Benjamin, for appellant.

Charles R. Henry, for appellee.

HOOKER, J. Charles Warren was indebted to the plaintiff, and as an inducement for further credit, gave to him an order upon defendant, who was Warren's employer. It read as follows:

"TOWER, March 13, 1908.

"D. A. STRATTON:

"Please pay my wages to Max H. Weinberg hereafter until further notice.

"CHARLES WARREN."

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The order was delivered to defendant who accepted it. Defendant has paid to plaintiff all of Warren's wages up to January 4, 1909, when he was served with the following writing signed by Warren:

"TOWER, MICH., Jan. 4th, 1909.

"D. A. STRATTON:

"I hereby withdraw any order given by me for my wages which was given prior to January 1st, 1909.

"CHARLES WARREN."

And this was accepted.

On January 15, 1909, plaintiff, having learned that Warren had countermanded the order, caused the following notice to be served on defendant:

"TOWER, MICHIGAN, Jan. 15, 1909.

"D. A. STRATTON,

"Tower, Michigan.

"*Dear Sir:* Assignment of wages which Charles Warran gave me on you, and which you accepted in writing last summer, was in the following form:

"'D. A. STRATTON:

"'Please pay my wages to Max H. Weinberg until otherwise ordered withdrawn by him.

[Signed] "'CHARLES WARREN.'

"Under this order I wish to notify you that I am entitled to all his (Charles Warren's) wages until my account is fully paid. The balance he still owes me is $57.00, and I will hold you personally responsible if you turn over that or any other amount to any other person excepting myself, and I hereby notify you to that effect.

"Respectfully,

"MAX H. WEINBERG."

After the 4th of January, 1909, Charles Warren earned and received checks for his wages as follows:

Jan. 9, 1909	$20 00
Jan. 23, 1909	16 95
Feb. 6, 1909	23 00
Feb. 20, 1909	14 75
Mar. 6, 1909	23 40

—no part of which was applied by the said Charles War-

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ren on his (Warren's) indebtedness to said Max H. Weinberg.

Plaintiff sued and recovered a judgment in justice's court against defendant for the balance of his claim against Warren, some $57. Defendant appealed to the circuit court where the cause was tried without a jury, and the case is before us on exception to the findings of law. The findings of fact were in substantial harmony with the foregoing statement, and the findings of law were as follows:

"**Conclusions of Law.** (1) When Warren, on January 4, 1909, served upon the defendant the withdrawal of the order of date March 13, 1908, the plaintiff had no further claim on defendant for the wages of Warren.

"(2) At the time of the commencement of this suit the defendant was not indebted to the plaintiff in any amount whatever.

"(3) The defendant did not undertake and promise said plaintiff as in his declaration alleged.

"(4) That a judgment of no cause of action be entered in favor of the defendant and against the plaintiff, and that defendant recover his costs and charges by him about his suit in this behalf expended.

"FRANK SHEPHERD, Circuit Judge."

Plaintiff has appealed from a judgment of no cause of action. Error is assigned upon the foregoing exceptions, and also to the exclusion of certain testimony. Upon the trial the parties presented the following stipulation:

"It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above-entitled cause, that the foregoing stipulated facts, except as otherwise stated, are the facts in this case. Both the parties, however, reserving the right to produce witnesses for the purpose of showing the conversation between plaintiff and Charles Warren on the 11th day of March, 1908, preceding the giving of the order dated March 13, 1908, and that the court shall make a finding of facts as to what that conversation was, which, in addition to the agreed facts herein set forth, shall constitute the facts in this case."

The following then occurred:

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"Max H. Weinberg (sworn), examined by Mr. Benjamin:

"*Q.* You are the plaintiff in this case?

"*A.* Yes, sir.

"*Q.* Do you remember about the time that Charles Warren gave you the order on Mr. Stratton, upon which the suit is in this case?

"*A.* I do; yes, sir.

"*Q.* Was there any conversation with Mr. Warren previous to the giving of that order?

"*A.* Yes, sir.

"*Q.* When and where?

"*A.* In the store—in my place of business.

"*Q.* In Tower?

"*A.* In Tower; yes, sir.

"*Q.* Who was present besides yourself and Mr. Warren?

"*A.* Jonas ———.

"*Q.* What was the conversation?

"*Mr. Henry:* Now, your honor, I desire to object to this. The court has read the facts which have been agreed upon by counsel and myself. We could not agree upon what this conversation was. Therefore the one point upon which we agreed to take testimony is upon that point. But I regard the conversation, whatever it may have been, as wholly immaterial. While the case is being heard before the court, perhaps it might not make so much difference, yet I desire to save the point. Here is a conversation in which Mr. Stratton was not present and not a party to. We maintain that, in so far as the issue is concerned, it is entirely immaterial. Mr. Warren is not the defendant in this case—Mr. Stratton is the defendant; and therefore, to all of this, I desire to interpose our objection.

"*Mr. Benjamin:* We claim that under the stipulation in this case we are entitled to show this conversation.

"*The Court:* Well, suppose you do, what difference does it make, if it is immaterial?

"*Mr. Benjamin:* It is not immaterial. It shows the exact conditions for which this order was given. It is not to vary the terms of the instrument that we put it in, but just to show the purpose for which it was given; and that would be perfectly competent. For instance, your honor, a man giving a deed for a certain piece of property, as a mortgage, as security for an indebtedness, you would have

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a right to show it was given as security. In the same way, we would have a right in this case to show that this order was given as security for a certain indebtedness.

"*The Court:* That is not the point that Mr. Henry makes. The point Mr. Henry makes is that it is a conversation with a person who is a stranger to this suit.

"*Mr. Benjamin:* Mr. Warren is not a stranger. Mr. Warren, we claim, makes an assignment of his wages—he is working for Mr. Stratton—employed by him. He makes an assignment of his future wages to Mr. Weinberg as security for past indebtedness and also future indebtedness; and then this order is afterwards taken to Mr. Stratton and is accepted by his agent. Now the fact that a man makes an assignment that, of itself, is complete, without a third party being present.

"*The Court:* Any conversation that Mr. Weinberg may have had with Mr. Warren will not bind Mr. Stratton, except as it was communicated to Mr. Stratton.

"*Mr. Benjamin:* I am trying to show the assignment of the claim—the whole arrangement. Now, what difference does it make whether Mr. Stratton was there or not?

"*The Court:* Because you delivered to Mr. Stratton just what you did deliver, and that is all he is bound by—what he had notice of. If you delivered something that was not an assignment on the face it, and he was not notified any differently, then he is only bound by what he received. Any instrument that was delivered to him, he had a right to believe contained all there was.

"*Mr. Benjamin:* We have a right, I think, to show the terms of the instrument. It is ambiguous—it simply says: 'Pay my future wages to Max H. Weinberg until further notice.' Now, 'further notice,' what does that mean?

"*The Court:* Well, we are bound by that, I think, in this controversy.

"*Mr. Benjamin:* A man assigns a claim to another party. Well, the assignor has no further rights as to that claim. He can't do any act afterwards that will defeat his assignment. Now, you might say, that being so, that 'until further notice' would mean then the notice by the party who has the assignment. Now, what we want to show by this conversation is as to how long this order was to hold good.

"*The Court:* The order itself shows that—'Until further notice.'

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"*Mr. Benjamin:* I want to show what was meant by that.

"*The Court:* Why, isn't that plain enough? Until Mr. Stratton was notified otherwise. I am afraid it would be error to admit it, if the decision should go in your favor. It might be reversed.

"*Mr. Benjamin:* We will take an exception to the ruling of the court, then, under that view of it."

We understand plaintiff's claim to be that this conversation, had it been shown, would have established an oral assignment by Warren to plaintiff of all his wages, earned and to be earned from the defendant under his existing employment, until the amount then owing or that should thereafter accrue to plaintiff should be paid in full. The plaintiff asserts that he had, and offered, testimony that would show that Warren's agreement amounted to an assignment of his wages to be thereafter earned, until his indebtedness to plaintiff, prospective as well as that already incurred, should be paid. If this is true, plaintiff was entitled to receive the same whether defendant was present or had notice of the assignment or not, for any one may assign a credit without consulting his debtor. 4 Cyc. p. 17, and note; *Id.* pp. 32, 34. The question involved in this offer was whether a valid assignment of wages was made by Warren to plaintiff; and this might be whether defendant consented or not, and whether he was a party to the talk or not. It is not a question of promise on his part to pay Warren's debt, but a question as to who was the owner of his obligation to pay. It is possible that he may have had a defense to such claim—*i. e.*, that he had paid in ignorance of the assignment—but that is another matter. The learned circuit judge should have admitted the testimony in accordance with the stipulation.

BLAIR, J. Assuming that plaintiff would have shown, if permitted, an oral assignment by Warren to plaintiff of all his wages, earned and to be earned, from the defendant under his existing employment until the amount then

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or thereafter owing should be paid, I think the court correctly held that such showing would be immaterial.

The plaintiff notified the defendant, in substance, that the only assignment he had was the written assignment accepted by defendant in writing. This assignment was clearly terminable, in unambiguous terms, by Warren. Defendant, under Weinberg's notice, had a right to rely upon the written assignment as measuring the rights of the parties, and plaintiff was estopped to claim that there was any different assignment. The plaintiff having assured defendant that the written assignment was the only assignment, and this assignment having been lawfully terminated by Warren, defendant had a right to make the payments to Warren for the recovery of which this suit is brought.

I think the judgment should be affirmed.

STONE, J., concurred with BLAIR, J.

SUPPLEMENTAL OPINION.

HOOKER, J. I agree with Mr. Justice BLAIR that the plaintiff cannot recover any sum that was paid by defendant in reliance upon the notice given by his debtor, before he was notified that plaintiff claimed to be entitled to his wages up to $57. Payments made after that, if any, would be at defendant's own peril. But we do not know that he so paid any, except that due prior to January 15th, on which he knew that plaintiff claimed them. He could not say that he made subsequent payments in ignorance of plaintiff's claim that he was entitled to them. It was proposed to show that he was so entitled. If he was, they were his, and to say that he lost such ownership because he said he claimed them under the order is not an answer to his claim. Defendant had been served with an order, which this notice showed that plaintiff claimed was intended to give him further rights. Defendant's duty to pay plaintiff was not limited by the order he accepted if in fact plaintiff bought the claims as he offered to show.

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If that had been proved, the only defense would have been payment in ignorance of plaintiff's claim. As I have intimated in this opinion, that would have been a complete defense. If no notice whatever had been served by plaintiff, and defendant still had the money, could he say: It is true I have this money, and it is yours, as between your debtor and yourself, but you made a mistake in the order I accepted, and I am not obliged to pay you. Evidently this would be no answer.

The judgment is reversed, and a new trial ordered.

BIRD, C. J., and OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred with HOOKER, J.

PARSONS v. BILLS.

1. BOUNDARIES—LINE FENCE—SETTLEMENT OF DISPUTE.
   A line fence, maintained for more than forty years as a section line, cannot be held to have been built by agreement, as a boundary line, where there is no evidence that a dispute existed or a disagreement was settled when it was built.

2. SAME—ADVERSE POSSESSION.
   Held that the facts did not establish adverse possession of the land in dispute.

3. SAME—SURVEYS—ANCIENT MONUMENTS.
   A boundary will be considered established by a line fence which remained and was treated as the division fence between two parcels for forty years, by the adjoining proprietors, where the evidence showed that it was so treated by one private survey, and a later survey, showing a different location of the boundary, did not appear from the proofs to have been based on the finding of any original government monuments.

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Appeal from Shiawassee; Miner, J. Submitted June 20, 1910. (Docket No. 111.) Decided December 7, 1910.

Bill for an injunction by William P. Parsons against Seward A. Bills and Ida May Bills, to restrain trespass. From a decree for complainant, defendants appeal. Affirmed.

Seth B. Terry (*Walsh & Pardee*, of counsel), for complainants.

Hicks & Doty, for defendants.

OSTRANDER, J. This suit was brought to have determined the boundary between sections 4 and 5, in town 5 north, of range 4 east. The jurisdiction of the court, which is not questioned, may be sustained upon the ground that defendants are charged with having by stealth, as well as by force, attempted to secure possession of a strip of land, and have built some part of a line fence over on the land complainant claims to own and which he has occupied for about 40 years. The decree appealed from establishes the line in accordance with complainant's contention and theory, and requires defendants to remove the fence built by them to the line so established, and hereafter to maintain the said division fence upon said line. Two surveys of a line are proven and the existence of a division fence, erected and maintained for many years upon a line corresponding with one of said surveys and with complainant's contention. Complainant, relying upon the survey which is favorable to his contention, also advances the theory that the said division fence was established by agreement of adjoining owners, and the further theory that he has acquired, by adverse possession, the title to all land lying west of said line fence.

The evidence of the establishment of a line by agreement and acquiescence is not sufficient to satisfy the rule laid down in *Smith* v. *Hamilton*, 20 Mich. 438 (4 Am. Rep. 398), and approved in *Olin* v. *Henderson*, 120 Mich.

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149, 158 (79 N. W. 178). See, also, *Chapman* v. *Crooks*, 41 Mich. 595 (2 N. W. 924); *Manistee Manfg. Co.* v. *Cogswell*, 103 Mich. 602 (61 N. W. 884).

It appears that complainant purchased and received a conveyance of the E. ½ of the S. E. ¼ of section 5 in the year 1870, immediately occupied it, and has ever since been in possession. There was then a fence, log and rail, on the east side of the land, running both from the north and from the south to a swamp, through which there was no fence. Flush with this fence, and in the southeast corner of the land, complainant built his house in 1874. The W. ½ of the S. W. ¼ of section 4 was then occupied by one Charles Jacobs, who purchased in 1870, lived on the land for a year or two, and then sold it to complainant. Complainant sold and conveyed it in May, 1876, to Barnum, Dunn and Lee, who conveyed to Straussine in April, 1877, who reconveyed to complainant in January, 1886. This last deed was executed pursuant to a contract for the purchase of the land, made in 1883, in which complainant and one Robert Craig were named as vendees, Craig having assigned his interest to complainant. Thereafter, in April, 1903, complainant conveyed to defendants, who are husband and wife. The line fence in question was erected some time between 1864 and 1869. When complainant conveyed to Barnum and others in 1876, he reserved his house, but not the land on which it stood. This was because the purchasers, or one of them, told him he thought the house was on the line. Complainant heard, also, that Straussine proposed to make him move his house, but he says this was not the reason for repurchasing the land on section 4 from Straussine. When complainant conveyed to defendants, he excepted, out of the W. ½ of the S. W. ¼ of section 4, a strip of land next to his house, the particular description being:

"Commencing at the southwest corner of southwest quarter and running thence east twenty-five feet; thence north thirteen rods and five and one-half feet, thence west

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twenty-five feet to section line, thence south on section line to place of beginning."

He learned from Mr. Bills, in the autumn of 1904, that he questioned the line indicated by the old fence, and in 1907 or 1908, perhaps in both years, Bills attempted to build, and did build in 1908, a new fence west of the old line fence, beginning at the north line of the land and running 80 rods to the south. This fence at the north end of it is about a rod and a half west of the old line fence, and at the south end is from eight to ten feet west of the old fence. While the original fence was long maintained as a line fence, there is no evidence of a dispute or disagreement settled when it was built, and, although complainant occupied and cultivated the land west of the fence, claiming to own it, adverse possession is not established by the facts.

We are therefore required to examine the record and other evidence of the surveys. There are two, known, respectively, as the "Huggins" and "Mason" survey. Huggins made a survey in 1851, but it is called and treated as a private survey, not recorded. Ezra Mason made a survey of all of section 9 in 1866. In 1880 Huggins made another survey, and one of the points assumed by him to be correctly established was the southwest corner of section 4, evidenced by a stone found in the road. In 1880 Lyman Mason, then county surveyor, made a survey. He assumed that a corner set or rewitnessed by Ezra Mason was correctly established. All of these surveyors are dead, and it is impossible to tell whether any of them found the original government monuments. The Huggins surveys correspond with the line fence. The Mason survey indicates the true section line as being some 27 feet west of the fence at the north line of the land in question, and about 5 feet and 10 inches west of it at the south line. The trouble about both surveys, as showing the true line, is the absence of any established starting point. The question resolves itself into one of probabilities. We dispose of the matter by saying that it is quite as probable that the old fence was built upon the section line as that it was not,

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and, having marked a boundary for about 40 years, that boundary ought not to be moved without better evidence than the record affords that it is incorrect.

We affirm the decree below, with costs to appellee.

BIRD, C. J., and HOOKER and STONE, JJ., concurred. BLAIR J., concurred in the result.

WITHEY v. BLOEM.

1. CONSTITUTIONAL LAW—FREEDOM OF CONTRACT—PERSONAL LIBERTY—REGULATING EMPLOYMENT OF WOMEN—POLICE POWER.
   Act No. 285, Pub. Acts 1909, providing that no female shall be employed in any factory, mill, store, shop, or warehouse more than 10 hours in any day, or 54 hours a week, is a valid exercise of the police power, and does not violate the fourteenth amendment of the Constitution of the United States, by improperly restricting the right to contract.[1]

2. SAME—CLASS LEGISLATION—FEMALE LABOR.
   That women, employed in establishments where perishable products are preserved, are excepted from the operation of the statute, does not invalidate it, as class legislation; the exception being reasonable and founded on a substantial distinction.

Appeal from Barry; Smith, J. Submitted June 27, 1910. (Docket No. 94.) Decided December 7, 1910.

Bill by Hattie Withey and others against Isaac Bloem, deputy factory inspector, and Richard H. Fletcher, commissioner of labor, to enjoin the enforcement of Act No.

[1] As to limitation of hours of labor by statute or ordinance, see note to *People* v. *Orange County Road Construction Co.* (N. Y.), 65 L. R. A. 33; and note to *People* v. *Williams* (N. Y.), 12 L. R. A. (N. S.) 1130.

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285, Pub. Acts 1909. From a decree for complainants, defendants appeal. Reversed.

Beaumont, Smith & Harris and *Colgrove & Potter*, for complainants.

Franz C. Kuhn, Attorney General, and *Charles W. McGill*, Assistant Attorney General, for defendants.

MOORE, J. The International Seal & Lock Company is a corporation engaged in manufacturing large quantities of seals which are used by railroad companies and shippers of freight for the purpose of locking the doors of freight cars. Aben E. Johnson is an assistant to the general manager of the factory of the said corporation, and the other complainants are women employed by said corporation in its factory. The legislature of 1909 passed an act entitled:

"An act to provide for the creation of a department of labor; to prescribe its powers and duties; to regulate the employment of labor; to make an appropriation for the maintenance of such department and to prescribe penalties for the violation of this act." Act No. 285, Pub. Acts 1909.

Section 9 of said act provides, in part, that:

"No female shall be employed in any factory, mill, warehouse, workshop, clothing, dressmaking or millinery establishment, or any place where the manufacture of any kind of goods is carried on, or where any goods are prepared for manufacturing, or in any laundry, store, shop or any other mercantile establishment, for a period longer than an average of nine hours in a day or fifty-four hours in any week nor more than ten hours in any one day: *Provided, however*, That the provisions of this section in relation to the hours of employment shall not apply to nor affect any person engaged in preserving perishable goods in fruit and vegetable canning establishments."

The complainants filed a bill of complaint in chancery asking to have the provisions of section 9 and section 54 of said act held unconstitutional. The defendants filed a

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demurrer to the bill of complaint. The demurrer was overruled by the trial court for the reason that the proviso in section 9 was class legislation. The defendants have appealed to this court.

It is not claimed the act is contrary to the provisions of the Constitution of this State because section 29 of article 5 of the revised Constitution of the State of Michigan reads as follows:

"The legislature shall have power to enact laws relative to the hours and conditions under which women and children may be employed."

It is claimed as follows (we quote from the brief of counsel):

"(*a*) The law violates the fourteenth amendment to the Constitution of the United States, unless it can be defined as a 'health' law.

"(*b*) The law does not purport to be a 'health' law, or to be passed to meet an emergency and to protect the health of women.

"(*c*) The law, therefore, if sustained at all, must be sustained on the theory that labor at any employment by women for more than an average of nine hours is harmful, and that a law so restricting female labor is a reasonable exercise of the police power.

"(*d*) The law is, however, void as class legislation, since it discriminates between the various classes of female labor."

Counsel subdivide each of these heads and argue them at length, citing many authorities which they claim apply.

It must be conceded at the outset that the courts have differed about the questions involved. The most marked difference, however, is between the earlier decisions and the later ones. In Bierly on Police Power, p. 9, it is said:

"The police power has been defined to be devoted to the protection of the lives, health, and property of citizens and the maintenance of good order. It is the power of the State to make all manner of reasonable laws for the welfare of the commonwealth and the good people thereof."

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In Russell on Police Power, at page 28, it is said, that—

"The range of legislation with respect to subjects of governmental control in the exercise of the police power has been much extended within the last quarter of a century. The reason of this is obvious. Modern social life has called into being many agencies not heretofore existing."

The learned author then gives many instances of its exercise, among them being the prevention of diseases, the public health, and concerning hours of labor, and forbidding or regulating contracts for the labor of women and children. The author expresses the opinion that—

"With reference to many of the matters above named, there has been a progressive development of governmental functions, and this development is likely to continue with the increased application of science to the business of life."

From what we have quoted from the brief of counsel, it is evident that two important questions are presented:

First. Is the legislation in violation of the fourteenth amendment to the Constitution of the United States because it interferes with the right to labor and to make contracts in relation thereto?

Second. Is it class legislation?

In support of the first proposition, counsel cite a number of authorities, one of which (*Lochner* v. *New York*, 198 U. S. 45 [25 Sup. Ct. 539]) they regard of so much importance that they quote from it at great length in the brief. An examination of the opinion shows that the labor law which was before the court was not legislation in the interest of women or of minors, but applied to all employés of bakeries. The court said of the legislation which was then before it that the limit of the police power was reached and passed, and that the case differs widely from *Holden* v. *Hardy*, 169 U. S. 366 (18 Sup. Ct. 383), and *Jacobson* v. *Massachusetts*, 197 U. S. 11 (25 Sup. Ct. 358). In the course of the opinion, Justice Peckham, speaking for the court, used the following language:

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"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the Federal Constitution. *Allgeyer* v. *Louisiana*, 165 U. S. 578 (17 Sup. Ct. 427). Under that provision no State can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed 'police powers,' the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the fourteenth amendment was not designed to interfere. *Mugler* v. *Kansas*, 123 U. S. 623 (8 Sup. Ct. 273); *In re Kemmler*, 136 U. S. 436 (10 Sup. Ct. 930); *Crowley* v. *Christensen*, 137 U. S. 86 (11 Sup. Ct. 13); *In re Converse*, 137 U. S. 624 (11 Sup. Ct. 191). The State therefore has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the fourteenth amendment."

In *Muller* v. *Oregon*, 208 U. S. 412 (28 Sup. Ct. 324), which involved the construction of a statute relating to the hours of labor of women employed in laundries, Justice Brewer, who wrote the opinion, referred to the case of *Lochner* v. *New York*, *supra*, as follows:

"We held, in *Lochner* v. *New York*, 198 U. S. 45 (25 Sup. Ct. 539), that a law providing that no laborer shall be required or permitted to work in a bakery more than 60 hours in a week or 10 hours in a day was not as to men a legitimate exercise of the police power of the State, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in

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relation to his labor, and as such was in conflict with, and void under, the Federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor."

He also referred to a copious collection of data as to the course of legislation and expressions in relation to the restrictions imposed upon the labor of women, and proceeds as follows:

"While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: *Commonwealth* v. *Manufacturing Co.*, 120 Mass. 383; *Wenham* v. *State*, 65 Neb. 394, 400, 406 (91 N. W. 421, 58 L. R. A. 825); *State* v. *Buchanan*, 29 Wash. 602 (70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930); *Commonwealth* v. *Beatty*, 15 Pa. Super. Ct. 5, 17. Against them is the case of *Ritchie* v. *People*, 155 Ill. 98 (40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315).

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

"It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, pro-

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tected by the fourteenth amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the fourteenth amendment, restrict in many respects the individual's power of contract. Without stopping to discuss at length the extent to which a State may act in this respect, we refer to the following cases in which the question has been considered: *Allgeyer* v. *Louisiana*, 165 U. S. 578 (17 Sup. Ct. 427); *Holden* v. *Hardy*, 169 U. S. 366 (18 Sup. Ct. 383); *Lochner* v. *New York*, 198 U. S. 45 (25 Sup. Ct. 539).

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence, is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

"Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet, even with that and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but, looking at it from the viewpoint of the effort to maintain an independent position

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in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions —having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."

In the recent case of *Ritchie & Co.* v. *Wayman*, 244 Ill. 509 (91 N. E. 695, 27 L. R. A. [N. S.] 994), the court said:

"The right of the individual to contract with reference to labor is held inviolable under the constitution on the ground that the privilege of contracting with reference to labor is a property right, within the purview of the constitution. *Frorer* v. *People*, 141 Ill. 171 (31 N. E. 395, 16 L. R. A. 492). There inhere in the State, however, certain sovereign powers, among which powers is that characterized as the police power, which, when broadly stated, is that power of the State which relates to the conservation of the health, morals, and general welfare of the public, and the property rights of the citizen are always

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held and enjoyed subject to the reasonable exercise of the police power by the State. If this statute can be sustained, it must be sustained, we think, as an exercise of the police power. In *City of Chicago* v. *Dairy Co.*, 234 Ill. 294, 297 (84 N. E. 913, 914, 17 L. R. A. [N. S.] 684, 123 Am. St. Rep. 100), it was said:

"'The police power is said to be an attribute of sovereignty, and to exist without any reservation in the constitution, and to be founded upon the duty of the State to protect its citizens and to provide for the safety and good order of society.'

"In *McPherson* v. *Village of Chebanse*, 114 Ill. 46 (28 N. E. 454, 55 Am. Rep. 857), an ordinance prohibiting persons from keeping open their places of business in a city or village for the purpose of vending goods, wares, and merchandise on Sunday was sustained as a proper exercise of the police power. In *Booth* v. *People*, 186 Ill. 43 (57 N. E. 798, 50 L. R. A. 762, 78 Am. St. Rep. 229), section 130 of the Criminal Code, which declares grain option contracts to be gambling contracts, was held to be a valid police regulation. In *City of Chicago* v. *Gunning System*, 214 Ill. 628, on page 635 (73 N. E. 1035, 70 L. R. A. 230), it was said:

"'The police power of the State is that inherent or plenary power which enables the State to prohibit all things hurtful to the comfort, safety, and welfare of society, and may be termed "the law of overruling necessity." *Town of Lake View* v. *Cemetery Co.*, 70 Ill. 191 (22 Am. Rep. 71); *Wabash, etc., Ry. Co.* v. *People*, 105 Ill. 236. Anything which is hurtful to the public interest is subject to the police power and may be restrained or prohibited in the exercise of that power. *Dunne* v. *People*, 94 Ill. 120 (34 Am. Rep. 213); *Cole* v. *Hall*, 103 Ill. 80; *Harmon* v. *City of Chicago*, 110 Ill. 400 (51 Am. Rep. 698). All rights, whether tenable or untenable, are held subject to this police power. *Northwestern Fertilizing Co.* v. *Village of Hyde Park*, 70 Ill. 634.'

"In *City of Chicago* v. *Dairy Co.*, *supra*, it was held the regulation of the sale of milk and cream in bottles and glass jars by a city was a proper exercise of the police power, and in *City of Chicago* v. *Schmidinger*, 243 Ill. 167 (90 N. E. 369), that the bread ordinances of the city of Chicago, which fixed the size of loaves and regulated the sale of bread, were a valid exercise of the police power.

"From the examples above referred to, found in adjudicated cases, it will be seen that the police power is a

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very broad power, and may be applied to the regulation of every property right so far as it may be reasonably necessary for the State to exercise such power to guard the health, morals, and general welfare of the public. It is known to all men (and what we know as men we cannot profess to be ignorant of as judges) that woman's physical structure and the performance of maternal functions place her at a great disadvantage in the battle of life; that, while a man can work for more than 10 hours a day without injury to himself, a woman, especially when the burdens of motherhood are upon her, cannot; that, while a man can work standing upon his feet for more than 10 hours a day, day after day, without injury to himself, a woman cannot; and that to require a woman to stand upon her feet for more than 10 hours in any one day and perform severe manual labor while thus standing, day after day, has the effect to impair her health; and that, as weakly and sickly women cannot be the mothers of vigorous children, it is of the greatest importance to the public that the State take such measures as may be necessary to protect its women from the consequences induced by long continuous manual labor in those occupations which tend to break them down physically. It would therefore seem obvious that legislation which limits the number of hours which women shall be permitted to work to 10 hours in a single day in such employments as are carried on in mechanical establishments, factories, and laundries would tend to preserve the health of women and insure the production of vigorous offspring by them, and would directly conduce to the health, morals, and general welfare of the public, and that such legislation would fall clearly within the police power of the State. Legislation limiting the number of hours which women shall work in establishments similar to those enumerated in the statute now under consideration to a period of not more than 10 hours in any one day has been sustained in *Muller* v. *Oregon*, 208 U. S. 412 (28 Sup. Ct. 324); *State* v. *Muller*, 48 Or. 252 (85 Pac. 855, 120 Am. St. Rep. 805); *Wenham* v. *State*, 65 Neb. 394 (91 N. W. 421, 58 L. R. A. 825); *Commonwealth* v. *Manufacturing Co.*, 120 Mass. 383; and *State* v. *Buchanan*, 29 Wash. 602 (70 Pac. 52, 59 L. R. A 342, 92 Am. St. Rep. 930)."

The case of *Muller* v. *Oregon*, *supra*, from which we have quoted at such length, was cited with approval by

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this court in *People* v. *Case*, 153 Mich. 98 (116 N. W. 558, 18 L. R. A. [N. S.] 657). For an interesting discussion of one phase of the police power, see *People* v. *Smith*, 108 Mich. 527 (66 N. W. 382, 32 L. R. A. 853, 62 Am. St. Rep. 715).

We think it clear that, according to the great weight of modern authority, the provisions of the law are not unconstitutional.

Second. Is the law class legislation? Counsel contend (we quote from the brief):

"Section 9 of the act in question provides, among other things, as follows:

"'Provided, however, that the provisions of this section in relation to the hours of employment shall not apply to nor affect any person engaged in preserving perishable goods in fruit and vegetable canning establishments.'

"It is our contention that this exception makes the entire section of the act unconstitutional and void, and is class legislation. Under this exception women may engage their services any number of hours in preserving perishable goods, fruits, vegetables, and may work in canning establishments, 10, 12, or as many hours as they see fit to contract their services for. Solicitors for defendants contend that this bill, and especially section 9, is a health regulation. That by virtue of the police power the legislature has the right to pass such laws as in their judgment are calculated to preserve the health of the women of the State. This exception of the statute entirely abrogates this theory. The legislature, by injecting such an exception into the statute, satisfy us that they were not looking to the health of the women, but rather the preservation of fruits and vegetables. It is purely the spirit of commercialism, without any thought of the health of the women or the number of hours that they shall be employed; in other words, the provision means simply this: that, in order to protect the commercial interests of that class of citizens who are engaged in preserving perishable goods and who invested their money in canning establishments, they may work women any number of hours in order that their profits may be increased and their business not interfered with. If this is not class legislation, we can scarcely conceive what class legislation means."

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In the seventh edition of Cooley on Constitutional Limitations, p. 554, the following language is used:

"Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge."

In *Spurr* v. *Travis*, 145 Mich. 721 (108 N. W. 1090, 116 Am. St. Rep. 330), the "sales in bulk act," so called, was attacked upon the ground of being class legislation, and it was there held that it was not class legislation,

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though its operation was limited to merchants and to those merchants who owe debts.

The case of *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Insurance Co.*, 111 Md. 561 (75 Atl. 105), is directly in point. In this case the statute forbids the employment of children under 12 years of age in the mills and factories of the State "other than the establishments for manufacturing canned goods." It was held that the legislation was not class legislation.

In the case of *Ritchie & Co.* v. *Wayman*, 244 Ill. 509 (91 N. E. 695, 27 L. R. A. [N. S.] 994), from which we have already quoted, it was argued that the statute was class legislation. The court decided it was not open to that objection. Some of the language used in the opinion is as follows:

"It is next contended that the act in question is special legislation in this: *First*, that it singles out the business of those persons who are conducting mechanical establishments or factories or laundries and prohibits the employment of females in those establishments for a longer time than 10 hours in any one day, while other establishments engaged in substantially the same business are permitted to employ females any number of hours in one day; *second*, that it has the effect to divide men and women into classes; and, *third*, that, after women have been set aside as a class, to then divide women into two classes—that is, that women who work in mechanical establishments or factories or laundries are only permitted to work 10 hours in any one day, and that women who are not employed in mechanical establishments, factories, or laundries are permitted to work any number of hours in any one day—is special and class legislation, and unconstitutional and void.

"The business places which are enumerated by the statute—that is, mechanical establishments, factories, and laundries—form a class by themselves, and differ from mercantile establishments, hotels, restaurants, etc., in this: that the product of those establishments enumerated in the statute is largely produced by machinery, or the employés of such establishments work with machinery, or the pace at which the employés work in such establishments is set by other employés who work with machinery.

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It would seem, therefore, that the legislature has not arbitrarily carved out a class of establishments in which women whose time of employment is limited to 10 hours a day are to work, but that the line of demarcation between the establishments to which the 10-hour limit applies, and those to which it does not apply, is clearly defined. In *Hawthorn* v. *People*, 109 Ill. 302, 311 (50 Am. Rep. 610), the court said:

"'It (the statute) embraces all persons in the State similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. * * * A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced.'

"In *Gundling* v. *City of Chicago*, 176 Ill. 340 (52 N. E. 44, 48 L. R. A. 230), it was held that the city might regulate the sale of cigarettes, and that the law was not special legislation by reason of the fact that it did not require a license of all persons who sold tobacco in the city. In *City of Chicago* v. *Dairy Co.*, *supra*, it was held that the city might regulate the sale of milk and cream in bottles or glass jars without the ordinance being subject to the objection of being special legislation because all persons who sold milk or cream in the city did not fall within the terms of the ordinance. We do not think the statute objectionable on the ground that it amounts to special legislation. * * *

"As to the third objection, that women by the act are divided into two classes—that is, those whose service is limited to a 10-hour day and those whose service is not limited—we have also already suggested the answer to this contention, namely, that those women whose service is limited to a 10-hour day work in establishments whose product is produced by machinery, or whose employés work with machinery, or the pace at which such employés work, is set by other employés who work with machinery. We think that women thus situated, while at work, are under a pressure and spur which is much more likely to drive them to overexertion when exhausted by a long-continued effort, and thereby to impair their health, than are their more favored sisters likely to be driven, who are engaged in an employment which is not forced at all times up to the limit of production by the agencies of steam,

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electricity, or other motor power when applied to machinery. There is, therefore, we think, an obvious and clear distinction between the two classes of women when working in the class of employment covered by the statute and in other vocations of life, by reason of their environment when at work. It is well settled that legislation which applies only to a certain class of citizens is not, under all circumstances, class legislation. A law that is made applicable to only one class of citizens, however, must be based upon some substantial difference between the situation of that class and other individuals to which it does not apply. Here we think that substantial difference exists. *Harding* v. *People*, 160 Ill. 459 (43 N. E. 624, 32 L. R. A. 445, 52 Am. St. Rep. 344); *Gillespie* v. *People*, 188 Ill. 176 (58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176); *Horwich* v. *Laboratory Co.*, 205 Ill. 497 (68 N. E. 938, 98 Am. St. Rep. 254); *Starne* v. *People*, 222 Ill. 189 (78 N. E. 61, 113 Am. St. Rep. 389); *Jones* v. *Railway Co.*, 231 Ill. 302 (83 N. E. 215, 121 Am. St. Rep. 313). We therefore conclude the act now under consideration is not subject to the objection that it is class legislation because it does not apply to all women who perform manual labor."

See, also, 9 Mich. Law Review, p. 44.

If legislation which applies to one calling only, pursued by women, is not class legislation, it is difficult to see how legislation which applies to many callings pursued by women can be said to be class legislation because it does not apply to all callings pursued by her. We conclude the legislation is not unconstitutional, and that it is not class legislation.

The decree of the lower court is reversed, and one may be entered here dismissing the bill of complaint, with costs of both courts.

OSTRANDER, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

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JAMES B. CLOW & SONS *v.* DOWAGIAC GAS CO.

CORPORATIONS—CONTRACTS—CONSOLIDATION—AUTHORITY OF PRESIDENT.

Liability of defendant company for merchandise furnished by plaintiff to its predecessor corporation, is established by evidence that defendant's president negotiated the transfer of corporate assets to the defendant from its predecessor under an arrangement to pay plaintiff's claim; that defendant accepted the benefit of the president's agreement and purchased the plant and property of its predecessor, including the property furnished by plaintiff; that the president of defendant later promised to pay the obligation to plaintiff, who accepted his proposition.

Error to Cass; Des Voignes, J. Submitted June 29, 1910. (Docket No. 12.) Decided December 7, 1910.

Assumpsit by James B. Clow & Sons, a corporation, against the Dowagiac Gas Company, a Michigan corporation, for goods sold and delivered. Judgment for plaintiff and defendant brings error. Affirmed.

Coy W. Hendryx, for appellant.

Charles E. Sweet, for appellee.

BLAIR, J. This cause was tried by the court without a jury, and from the finding of facts and the correspondence referred to therein, it appears that the plaintiff is an Illinois corporation doing business in Michigan, selling gas pipe and gas fittings. The defendant is a Michigan corporation with its principal office now at Indianapolis, Ind., and its place of business at Dowagiac, Mich. The defendant company, some time in the year 1907, was organized, and at the time of its organization the stockholders appear to have been, A. Quinn, Indianapolis, 498 shares, N. L. Clawson, Indianapolis, one share, and Fos-

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ter G. Shirley, one share. Afterwards, when negotiations were had with the Dowagiac Gas & Fuel Company, the stockholders appear to have been the said Quinn, Clawson, Shirley, Russell B. Harrison, M. Lafollette, Frank W. Lyle, and C. T. Amsden, the number of shares being 1,000, of which Russell B. Harrison had 800, Chas. T. Amsden, 30, and Frank W. Lyle, 40. In the spring of 1907, negotiations were had between Russell B. Harrison, president of the defendant company, and Frank W. Lyle, president of the Dowagiac Gas & Fuel Company, whereby the Dowagiac Gas & Fuel Company sold out and transferred its property to the defendant company, the transfer to be made as soon as certain formalities were gone through with. While the trade was pending between the two presidents, the invoice of pipe and fittings which is the subject-matter of this suit was purchased by the old company, Dowagiac Gas & Fuel Company, from the plaintiff, and on May 1, 1907, John F. Griffin, superintendent, sent a check for $1,104.92 to the plaintiff, drawn on the account of the Dowagiac Gas & Fuel Company. This check was protested for nonpayment, with reference to which Mr. Lyle wrote the following letter:

"DOWAGIAC GAS AND FUEL COMPANY.
"DOWAGIAC, MICH., May 4, 1907.
"JAS. B. CLOW & SON,
"Chicago.

"*Gentlemen:*

"Referring to the check of this company for $1,104.92, which was returned today, we beg to explain: This company is under contract to sell its plant and business, and your bill is to be paid by the new company. I so instructed the new superintendent, but he forgot my instructions and sent you a check signed by the old company. Please return the check to us, and the new company will forward you a check including the protest fee, if any.

"Regretting the mistake, we are,
"Yours truly,
"DOWAGIAC GAS & FUEL COMPANY.
"F. W. LYLE, Pt."

Under date of September 26th, a letter was written by

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Mr. Harrison to Mr. Wyeth, credit man of plaintiff, in which he said:

"In view of the extension from thirty to sixty days, as agreed upon by Messrs. Clow & Sons, I have agreed to look after and arrange for the payment of the indebtedness on the part of the new company just as soon as this possibly can be arranged after the transfer of the property to the Dowagiac Gas Company."

Afterwards on October 4, 1907, Mr. Harrison wrote to plaintiff, on the letterhead of the Dowagiac Gas Company, signed, "Dowagiac Gas Company, by Russel B. Harrison, President," as follows:

"When the sale of property of the Dowagiac Gas & Fuel Company to the Dowagiac Gas Company is completed the indebtedness of the Dowagiac Gas & Fuel Company to your firm, amounting to about $1,100 will be assumed and taken care of in the manner agreed upon at the recent conference of the writer and Mr. J. C. Clow."

Again, on December 16th, on the letterhead of the defendant, signed, "Russel B. Harrison, President," Mr. Harrison wrote plaintiff:

"I write to say that I have written the general manager at Dowagiac, requesting him to send check for all the funds that can be spared for the purpose of applying same on your account. This check will be in your hands before the end of the week."

Following these conferences and these two letters, with others, Mr. Wyeth called on the defendant at Dowagiac, where he interviewed Mr. Griffin, superintendent, and Mr. Lyle, director, who both insisted upon his talking over the telephone with Mr. Harrison, and, after this talk, the check for $150, signed by the defendant company, was given to Mr. Wyeth; and on December 23d Mr. Harrison wrote to Mr. Wyeth, referring to this conference by telephone and the payment of the check for $150. On January 9, 1908, Mr. Harrison wrote to J. C. Clow, secretary of plaintiff, as follows:

"In view of your suggestion that you do not wish to work

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any hardship to the company, I suggest the following plan, and, if accepted, will insist upon its being carried out, a payment of $150 between the 10th and 15th of each month until the indebtedness is entirely paid. The first payment to be made upon the acceptance of this proposition, interest at the rate of 6 per cent. to be paid on account."

This letter was followed by one from Mr. Harrison on January 13, 1908, in which he said:

"I write to make inquiry if my proposition is satisfactory. I am led to this inquiry as I have received from the Dowagiac Gas Co. a check for $150 which I desire to forward to you promptly, if the proposition is satisfactory. If as you say, you desire to work no hardship to the Dowagiac Gas Co., all you have to do is to accept the proposition and payments will start immediately."

To this, reply was made by Mr. Clow on behalf of the plaintiff, accepting the proposition, and on January 15th, two days later, Mr. Harrison wrote the plaintiff a letter which contained these words:

"As we appear to have reached a complete and thoroughly satisfactory understanding in this matter, I hasten to place in your hands, on behalf of the company, check No. 9 of the Dowagiac Gas Co. on the City Bank of Dowagiac, payable to the order of James B. Clow & Sons for $150. Kindly acknowledge receipt."

This payment of $150 was received by the plaintiff, since which time no further payments have been made. The balance unpaid, with interest from May 10, 1907, at 6 per cent., amounts to $894.36. It is undisputed that Russell B. Harrison, who was the owner of four-fifths of the capital stock of the defendant company, was president of the defendant company, and managed its affairs during all the time the letters and conferences between the parties to this suit, as well as between the two gas companies, were had; and that the business of the Dowagiac Gas Company, the defendant, was managed by Russell B. Harrison, its president; and that Russell B. Harrison, during negotiations for the purchase of the plant of the old com-

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pany, agreed with Mr. Lyle, president of the old company, to pay plaintiff the bill for which this suit is brought. Precisely when the transfer between the gas companies was completed, by turning over the pipe in question and other property, does not appear, but the correspondence shows that it was, at least, later than October 4, 1907. The trial court found that plaintiff was entitled to recover, and defendant has brought the record to this court for review.

We are of the opinion that the court did not err in his conclusion of law. The defendant company, having accepted the fruits of the agreement negotiated on its behalf by its president to purchase the plant of its predecessor, including the pipe, became bound by the president's agreement that defendant would pay for it and assumed the indebtedness as its own obligation in consideration of the delivery of the pipe. The defendant having assumed this obligation, its president was authorized to make the agreement in question with plaintiff, and plaintiff, having accepted defendant's obligation in place of the obligation of its predecessor, was entitled to maintain this action against defendant. 2 Thompson on Corporations (2d Ed.), § 2020; *Gould* v. *Gould & Co.*, 134 Mich. 515 (96 N. W. 576, 104 Am. St. Rep. 624).

The judgment is affirmed.

BIRD, C. J., and MOORE, OSTRANDER, and BROOKE, JJ., concurred.

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DILLIE v. LONGWELL.

1. ADVERSE POSSESSION—PERMISSIVE USER—RECOGNITION OF PROPRIETOR'S RIGHTS.
   Title does not pass by adverse possession, when the occupation is by consent of the owner, and his rights are recognized by a conveyance of adjacent premises to a purchaser by the adverse claimant, without including the premises to which title is asserted, and which, it is contended by the claimant, were, in fact, transferred by the conveyance.

2. REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE REQUIRED.
   While a deed may be reformed when it is satisfactorily proven that a mutual mistake has been made, such fact must be clearly made to appear.

3. SAME.
   And evidence of the grantee that a parcel was to be included in the deed, contradicted by the grantor, and not satisfactorily supported by other proofs, is insufficient to warrant a decree reforming the instrument so as to include the omitted parcel, on the ground of mistake.

Appeal from Van Buren; Des Voignes, J. Submitted October 5, 1910. (Docket No. 3.) Decided December 7, 1910.

Bill by Nathaniel E. Dillie and Mary E. Dillie against Edgar B. Longwell, Jessie Longwell, Thomas Welch and Rowena Welch to reform a deed and enjoin an action of ejectment. From a decree for complainants, defendants appeal. Reversed.

Thomas J. Cavanaugh and *A. Lynn Free*, for complainants.

David Anderson and *Glenn E. Warner*, for defendants.

HOOKER, J. The complainant is in possession of cer-

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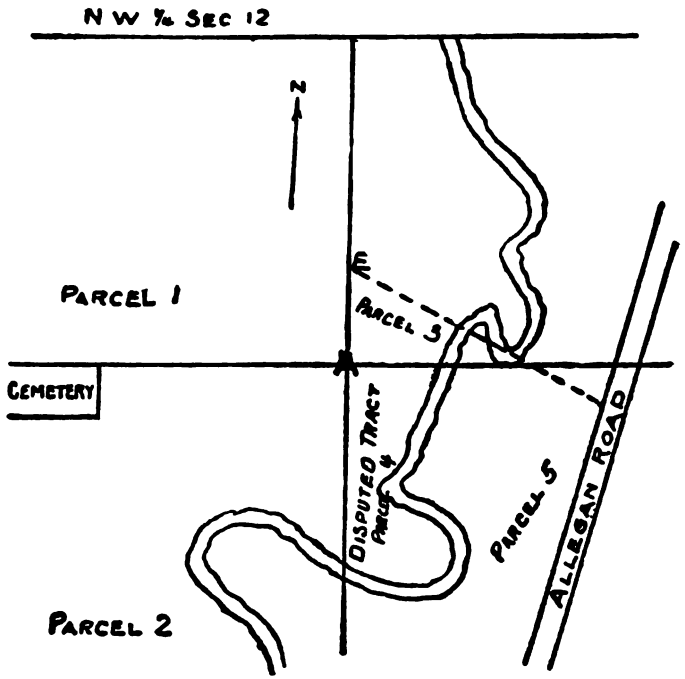
tain lands upon which he entered under a deed from one Gleason. They consist of two 40-acre parcels, a 3-acre parcel, and a piece of about 4 acres. His grantor had the legal title to all except the latter. He had no paper title to that. The situation will be more easily understood by an examination of the annexed map:



Parcels marked "1," "2," "3," and "4" are the parcels mentioned. That marked "4" only is in dispute. It consists for the most part, of low marsh ground along the Paw Paw river. At the time Gleason's deed was made by Mrs. Welch, she owned all four parcels, and also other lands east of the river in the S. E. ¼ of the N. W. ¼ of the section. Complainant asks that her deed to Gleason (his grantor), be reformed and made to include par-

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cel 4, upon the ground that, when Gleason bought, it was understood by both parties to the negotiation that parcel 4 was a part of the land sold and purchased, and that it was omitted through inadvertence and mistake. To establish his case he endeavored to prove:

First. That one Clapp was the owner by deed of the N. W. ¼ and S. W. ¼ of the N. W. ¼ of Sec. 12, being 80 acres, as well as other lands on the section west of 12; that he took possession as early as 1865, and from that time until 1891 he occupied and used for pasture and cutting marsh grass parcel 4, to which he had no paper title, and the complainant makes the claim that he (Clapp) thereby acquired title by adverse possession.

Second. That on April 2, 1891, he sold and deeded to Welch the two 40-acre parcels.

Third. That Welch or his wife, at that time, owned parcel 3, which he had bought from Harrison, but did not own parcel 4, which Harrison had the paper title to, and attempted to convey to him by the same deed, but failed through uncertainty in the description.

Fourth. That Welch deeded all of these lands to his wife.

Fifth. That in March, 1893, Welch negotiated a sale of what he called the Clapp farm to Gleason, expressly stating that the portion on the S. W. ¼ of the N. W. ¼ of the section, extended to the river, and that on March 24, 1893, in accordance with their arrangement, he caused his wife to make a deed of the land conveyed which included parcels 1 and 2, which had belonged to the Clapp farm, and parcel 3 which had not. Parcel 4 was not included.

Sixth. That Gleason entered and occupied parcel 4, and he and Dillie have continued to do so, though both Welch and Longwell have disputed Dillie's right.

Seventh. That Mrs. Welch deeded parcel 4 to Longwell, by warranty deed, on October 15, 1897, and that he has brought ejectment against complainant.

Eighth. Complainant contends that Longwell took deed with notice of his rights.

Ninth. That since the making of these deeds, the village of Paw Paw has acquired, by purchase from Dillie, flowage rights upon parcel 4, and have now an artificial lake or pond upon the same.

The learned circuit judge in stating his conclusions

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found: That Clapp acquired title to parcel 4 by adverse possession. That the description in the Welch deed to Gleason recognized Clapp's former ownership of parcel 4. That the conduct of the Welches after the sale to Gleason in not questioning his and Dillie's title tended to strengthen the claim that the omission of parcel 4 from the deed to Gleason was a mistake.

We have endeavored to give these conclusions full weight, but we cannot agree with them. *First.* The claim that Clapp acquired title by adverse possession is not clear. Grant that he occupied the premises in dispute, there is an absence of proof that the occupation was adverse or even hostile, and, in denial of the owner's right, Harrison owned and sold and Welch bought it during Clapp's occupancy, and there is testimony indicating that the occupation was by consent of Harrison and therefore not hostile. Clapp did not convey it to Welch when he sold to him, which indicates that he (Clapp) was not claiming title against him at that time. Moreover, if he had acquired a title, not having sold it to Welch, it is in Clapp yet, for he did not convey to Welch, and Welch would have no title in it, being lost through Clapp's adverse possession, and the reformation of the deed would be useless, for it would convey no title. That finding would be fatal to complainant's case.

Our own conclusion is that Clapp has never divested the title to parcel 4 from Harrison or Welch, through adverse possession, and when he sold the 80 acres did not claim title to parcel 4, and that it belonged to Welch. We think there is no force in the claim that Welch treated it as a part of the Clapp farm, which it clearly was not.

First. Because the deed did not include it.

Second. Because he and his wife soon gave a warranty deed of it to Longwell, which negatives the thought that they acquiesced in the claim of Gleason and Dillie.

Third. Because West flatly denies the intention and understanding that it was to be included, and disputes the testimony of Gleason as to their negotiations.

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Again we may state, though it is of little importance, that the description in Harrison's deed to Welch is a perfect description, and includes parcel 4.

The relief prayed in the bill involves the equivalent of adding to a deed of conveyance, thereby increasing the amount of land conveyed by it, by virture of parol testimony. A deed is a solemn instrument, usually made with deliberation, and, while it may be reformed when it is satisfactorily proven that a mutual mistake has been made, such fact must be made to appear clearly. In the case of *Youell* v. *Allen*, 18 Mich. 109, COOLEY, C. J., said:

"The question whether a material error in a written contract for the conveyance of lands can be corrected on parol evidence, in a suit for the specific performance of the contract, and performance decreed according to the understanding as found upon such evidence, is one of no little difficulty, and upon which the authorities are irreconcilably at variance. If it can be, the evidence of the mistake upon which the court should give relief ought to be so clear as to establish that fact beyond cavil."

The same language was repeated by the same judge in *Vary* v. *Shea*, 36 Mich. 398. In *Burns* v. *Caskey*, 100 Mich. 100 (58 N. W. 644), Mr. Justice LONG said:

"That such mistake must be proved by clear and entirely satisfactory evidence, and that a mere preponderance of evidence is not sufficient, and that the mistake must be mutual and common to both parties to the instrument."

It is undeniable that, at the time Gleason took his deed, Mrs. Welch was the owner in fee of all these parcels, unless Clapp still owned parcel 4. Admitting that he did not, she did. She deeded to Gleason parcels 1, 2, and 3 only.

There is no evidence that she personally ever had an intention to convey more, but conceding that she was bound by her husband's intent and understanding, when he negotiated the sale, and caused the deed to be written, we have a conflict of the testimony between Gleason and Welch. The only important corroborating fact in support

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of Gleason is the fact that the deed to him mentions the southern boundary of parcel 3 as being land "formerly owned by Clapp" when in fact it was this parcel 4. Welch said that the scrivener made that description and that it was a mistake. It was not an unnatural inference on the part of the scrivener who doubtless knew that Clapp had occupied it. That does not throw much light on the question of the intention; certainly it was not clear and satisfactory proof, justifying the taking a parcel of land from Mrs. Welch and giving it to Dillie.

We are constrained to reverse the decree and dismiss the bill, with costs of both courts. It is so ordered.

BIRD, C. J., and OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

CITY OF DETROIT *v.* C. H. LITTLE CO.

MUNICIPAL CORPORATIONS — LICENSES — USE OF STREETS — ORDINANCE—DETROIT CHARTER.

An ordinance of the city of Detroit, forbidding any person from engaging in the business of using vehicles to draw earth and other materials (chapter 54, Compiled Ordinances of Detroit, § 2), without first procuring a license, is authorized by paragraph 186 of the charter of the city of Detroit, regulating the use of vehicles for hire, and does not prohibit a firm, engaged in the business of furnishing building and paving supplies, from delivering its commodities, by its private wagons, without a license; since the ordinance effects a regulation of a business, rather than of the use of streets under the power conferred by paragraph 170 of the charter.

Certiorari to the recorder's court of the city of Detroit;

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Connolly, J. Submitted October 10, 1910. (Docket No. 28.) Decided December 7, 1910.

The C. H. Little Company and Joseph Conant were convicted of violating a municipal ordinance. The said company brings certiorari. Reversed and no new trial ordered.

P. J. M. Hally and *Thomas Penniman*, for the people.

Willard E. Warner, for defendant.

OSTRANDER, J. Section 2 of chapter 54 of the Compiled Ordinances of the city of Detroit for the year 1904, as amended and approved January 2, 1907, is as follows:

"The mayor is hereby authorized to grant a license good for one year, or until the second Tuesday in March then next ensuing, to any person of good character, to drive, use, or cause to be driven or used, any vehicle for carting or hauling earth, chips, stone, bricks, ice, mortar, dirt, ashes, shavings, hay, straw, manure, filth, or rubbish of any description on his paying into the city treasury the sum of fifty cents, and executing a bond to the city of Detroit in the penal sum of one hundred dollars, with one or more sufficient sureties, conditioned that the licensee will faithfully observe the charter and ordinance of the city of Detroit, and indemnify said city against any loss or damage which it may sustain, or expense to which it may be put, by the unlawful dumping of contents of said licensee's vehicle upon any public street, alley, park or place within said city.

"No person shall engage in said business without a license from the mayor as herein provided."

The cause was submitted in the recorder's court upon the following stipulated facts:

"The C. H. Little Company is a body corporate organized and existing under the laws of the State of Michigan, and transacts business in and about the city of Detroit and elsewhere. It has seven yards in and about the said city at which it receives cement, sand, wall plaster, crushed stone, lime, sewer pipe, firebrick, metal lath, wall

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ties, wall plugs, stanchions, paints, stains, furnishings and other building and paving supplies, in boat load, car load and train load lots and quantities for storage, and from which said yards it delivers the same in the usual and ordinary course of business to its patrons, either by teams, wagons and vehicles of its own, or to its patrons' teams, wagons and vehicles, at such yards. Said yards are located as follows: One at 340 Atwater St. east; one at John R. St. and Lake Shore Ry.; one at Michigan and Hubbard Aves.; one at Woodward Ave. and Terminal Belt Line Ry.; one at Jefferson Ave. and Terminal Belt Line Ry.; one at foot of West End Ave., Delray; one at Bellevue and Berlin Aves. And its main office is at Nos. 34–40 Peninsular Savings Bank Bldg. in said city. During the ordinary season in which such materials are sold and delivered, it employs upon an average of 237 men, by the month, and others from time to time as its necessities require. It manufactures some of its commodities and buys others in car load, train load and boat load quantities, distributing the same to its several yards by railway cars, as required at such yards. It pays its annual city and State and county taxes upon its stock of commodities upon hand and upon its teams, wagons, harnesses, vehicles and all other utilities used in the conduct of its business, and such special assessments, if any, as may be assessed against it, a large part of which city taxes are used by said city in the construction and maintenance of its highways, over which the respondent and its patrons haul such portions as are delivered by wagon loads.

"For the deliveries of such materials to its patrons, it owns, keeps and maintains 147 horses, 69 double wagons and 9 single wagons, upon each side of which double and single wagons it attaches a board about six inches wide by four feet long upon which is painted, upon a yellow background in letters of black and five inches high, its name, 'The C. H. Little Co.,' following which in equally large characters is a 'No. ———,' specifying its own number of such wagon, which letters, words and figures may be read for a distance of several hundred feet by any casual observer, and by which the identity and ownership of such teams and wagons may, at all times, be known. Its teams and wagons are used only for the deliveries of its own materials and commodities, and they are never rented out, for hire, to other parties as a drayman, carman,

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truckman, porter, runner, driver of coupés, hackney coaches, omnibuses, carriages, sleighs, express vehicles or vehicles of any description used and employed for hire, but are owned and maintained only as a necessary adjunct to the conduct of its own business and for making deliveries to its own patrons of its commodities kept by it for sale and delivery. On or about April 28, 1909, and prior thereto, it had in its employ one Joseph Conant, to whom it paid regular weekly wages, and as its teamster in driving one of its teams and wagons loaded with a quantity of its product through the streets of Detroit, and upon each side of which said wagon was a board with its name and number as aforesaid, in plain sight and readily discernible as above stated. That at the time complained of the said wagon, team and driver were engaged in delivering its own material and product to one of its customers in said city in accordance with an order therefor. That at said time this respondent had not secured from the mayor of said city, nor any other representative thereof, any license nor number for such wagon, nor had it filed with said city a bond in the sum of $100 or any other amount as claimed to be required by an ordinance of said city, upon which the complaint herein is based. At the time aforesaid, the said Joseph Conant had no interest nor title whatever in and to said team and wagon, nor the contents thereof, but the same belonged solely to this respondent, who employed said Conant to drive the same. That, at the time complained of herein, the said team, wagon and driver were upon one of the public streets or highways within the limits of said city, and were stopped by a member of the police force of said city, who took the said driver's name, respondent's name and made the complaint herein on said April 28, 1909."

The C. H. Little Company was convicted of a violation of the ordinance and a fine of $25 was imposed. It sued out a writ of certiorari to review the judgment. The errors specified are based upon exceptions to the written findings and the conclusion of the recorder, and the point presented for decision is whether the ordinance has any application to the vehicles employed by the C. H. Little Company in carrying on its business. It is the contention on the part of the city, which contention the recorder sustained, that the ordinance was made in the exercise of

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power conferred by paragraph 170 of the charter, "to control, prescribe, and regulate the manner in which the highways, streets, avenues, lanes, alleys, and public grounds and spaces within said city shall be used and enjoyed," and that the case is ruled in principle by *People* v. *Schneider*, 139 Mich. 673 (103 N. W. 172, 69 L. R. A. 345). It is said in the brief for the city:

"We take the position that the power to pass and enforce section 2 of chapter 54 of the Compiled Ordinances of 1904, is derived solely and alone from said section 170, and in no wise do we claim that the common council was authorized to license vehicles which come within the description therein, under section 186, which gives the common council power to regulate and license vehicles of every description used and employed for hire and to fix and regulate the amounts and rates of compensation."

On the other hand, the contention of plaintiff in certiorari is that the ordinance is clearly the exercise of power granted by paragraph 186 of the charter:

"To license and regulate the keepers of hotels, * * * also solicitors of passengers, * * * also draymen, carmen, truckmen, porters, runners, drivers of coupés, hackney coaches, omnibuses, carriages, sleighs, express vehicles, and vehicles of every description used and employed for hire, and to fix and regulate the amounts and rates of compensation."

The ordinance, the provisions and validity of which were considered in *People* v. *Schneider*, was one limiting the speed of automobiles and other motor vehicles, and it required each owner of such a vehicle to register his name and residence and a description of his vehicle and to procure and display on the vehicle a number, to be purchased for a fixed sum from the city, before operating the vehicle in the streets of the city. The question involved was whether the common council had power to pass the ordinance. The power was found in paragraph 170 of the charter.

There is no question here of the power of the council to pass the ordinance which is sought to be enforced. It

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seems to be supposed by the city attorney that its construction and application may be broadened or narrowed, as power to pass it is referred to paragraph 170 or to paragraph 186, of the charter. The power conferred in paragraph 170 of the charter is, in a sense, more general—less restricted—than that conferred in paragraph 186. The particular ordinance is clearly intended, not as a regulation of the use of the highways of the city, but as a regulation of business. It agrees, in its terms, with the power delegated to the city in paragraph 186 of the charter, for which reason, if for no other, we regard the ordinance as passed in the exercise of the power thus conferred. The use of the streets by plaintiff in certiorari is not different in kind from the use made of them by any merchant who delivers goods to customers. The stipulated facts show that its business is not one which the ordinance was designed to regulate.

The judgment of the recorder's court is reversed, the conviction set aside, and no new trial granted.

BIRD, C. J., and BROOKE, BLAIR, and STONE JJ., concurred.

KNIGHTS OF THE MODERN MACCABEES v. SHARP.

1. INSURANCE—CONTRACTS—EVIDENCE.

Evidence *held* not to show that deceased and his wife, who each took out a policy in a fraternal benefit society, payable to the other, agreed that, after the death of either, their children should become beneficiaries under the policy then remaining in force, and that no change in beneficiary should be made by the surviving parent.

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2. SAME—COMPETENCY—CHANGE OF BENEFICIARY.
Children of the deceased husband, who, under the rules of the insurer, became the contract beneficiaries, after their mother, who was named as beneficiary, died, were entitled to assert the claim that the father was incompetent to afterwards change the beneficiary named in the policy, by the substitution of his second wife.

3. SAME — ACTION — PARTIES — EQUITY — ENFORCEMENT OF CONTRACTS BY THIRD PARTIES.
If such contract not to change beneficiaries was, in fact, made, no promise being made to any of the children in interest, no fund being in existence nor trust created, and the policy having no paid up value, it was revocable at any time, and the children could not enforce its performance by a suit in equity.

4. CONTRACTS—ENFORCEMENT BY PERSON INTERESTED—PARTIES.
A third person for whose benefit a contract is made, except in case of provisions for children under a marriage settlement, may not enforce performance in an action at law, or by suit in equity.

Appeal from St. Clair; Law, J. Submitted October 10, 1910. (Docket No. 14.) Decided December 7, 1910.

Bill of interpleader by Knights of the Modern Maccabees against Melinda Sharp and others. From a decree against Melinda Sharp, defendant, she appeals. Reversed.

John B. McIlwain, for complainant.

William E. Brown, for defendant Melinda Sharp.

Frank T. Wolcott, for defendant Lena Sharp and others.

OSTRANDER, J. The issues raised by the answers to complainant's bill of interpleader are sufficiently indicated in the opinion of the learned trial judge, as follows:

"On July 23, 1896, Asa B. Sharp and his first wife, Minnie D. Sharp, lived in the village of Yale, St. Clair county, Mich. At that time he was 30 years of age and his wife 28. They had five small children. He was a laboring man, and his family was dependent on his earn-

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ings for support. Some time prior to the above-named date, the husband and wife entered into a contract by the terms of which he agreed he would take out a policy of insurance in complainant order in which his wife should be named as beneficiary and so remain during her life and his, and, in case his wife should die before he did, that their children should always remain the beneficiaries; the wife agreed she would take out a policy of insurance in the Ladies of the Maccabees, a woman's fraternal benefit association, in which her husband should be named as beneficiary, and so remain during his life and hers, and, in case her husband should die before she did, that their children should always remain the beneficiaries. The consideration for this agreement on the part of each was the promise made by the other. The object of this mutual agreement was the protection of the children. The testimony of one witness, Grace O'Dell, goes to the extent of tending to show the existence of this contract prior to the time the policies were issued to the husband and wife, as hereinafter stated, while three other witnesses testify to having heard the husband and wife, in the presence of each other, state what their contract in this regard had been after or about the time of the issuance of the policies. On July 23, 1896, a policy for $1,000 was issued by complainant association to Asa B. Sharp, in which his wife was named as beneficiary, and on the same date a policy of like amount was issued by the Ladies of the Maccabees to Minnie D. Sharp, in which her husband was named as beneficiary.

"After these policies were taken out, Asa B. Sharp was laid up for a time with sickness, and was unable to earn money to support his family and to keep up his assessments, or his wife's assessments, on these policies of insurance. It appears from the testimony, that during this time, Minnie D. Sharp, relying on the agreement with her husband, as heretofore recited, went out washing, housecleaning, and doing other work in order to obtain money to support the family and to keep up the assessments on these policies, and it appears that she did for a time, at least, pay some of the assessments on her husband's policy. On January 1, 1902, Minnie D. Sharp deceased, and the proceeds of her policy in the Ladies of the Maccabees was paid to her husband, Asa B. Sharp, who had remained the beneficiary in her certificate since the time it was issued.

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"On August 17, 1904, Asa B. Sharp married Melinda Sharp, now his widow. At this time she was a widow with several children, living on her own farm in Lapeer county, Michigan. On April 19, 1906, Asa B. Sharp signed a paper revoking his former designation of beneficiary in his policy, and designated Melinda Sharp, his wife, as the new beneficiary. At the time he did this he was sufficiently sound in his mind to know who was his former beneficiary, to know to whom payment of benefits would be made in case of his death without any change in his certificate, to know and keep in mind his minor children, who were dependent upon him. He had been sick before this date, and had not fully recovered his physical strength, and, perhaps, not his normal mental powers, but he was sufficiently strong and sound mentally to transact and understand ordinary business affairs. Asa B. Sharp surrendered his first certificate, and on May 8, 1906, a new one was issued to him by complainant association in which claimant, Melinda Sharp, was named as beneficiary, and she remained as such designated beneficiary up to the time of her husband's death."

He concludes that each of said mutual promises was good consideration for the other, and that on the death of Minnie D. Sharp the agreement became fully executed on her part and the husband concluded from changing the beneficiary in his policy.

Two questions are presented, being, *first*, whether the parol agreement alleged to have been made by and between Asa B. Sharp and his first wife, Minnie, was in fact made; and, *second*, whether, if made, Asa was thereby precluded from making a change of beneficiary.

1. As to the question of fact, it is to be considered that the certificates issued by complainant have no value during the life of the assured except the value of the right to keep them in force. There is no cash or other surrender value, and default in the payment of the assessments which are levied avoids the contract. An agreement by the assured that he will never change the beneficiary named in his certificate is of no value to any one, unless the assessments are paid to the time of his death. The evidence relied upon to prove a mutual agreement between

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Asa Sharp and his wife Minnie, that neither would ever change the beneficiaries named in their respective certificates, is exceedingly vague and unsatisfactory and is found in the testimony of witnesses who attempt to tell of conversations and statements made in their presence by one or both of the contracting parties. The desire of both the husband and wife to make some provision for each other and, directly or indirectly, for their children, is manifested by their becoming members of complainant, taking out the certificates, and paying assessments. The statements and conversations related by the witnesses evidence little, if anything, more than this. It is true that one or more witnesses testify to a conclusion that an agreement existed between the husband and wife that the certificate held by the survivor of them should be payable to the children. For example, a witness testified:

"Mr. and Mrs. Sharp agreed before me, in my presence, that they should take out insurance in the Maccabees, his drawn to her and hers to him as long as they lived, and after her death his should run to the children, and after his death hers should run to the children, and never should be changed."

But when they detail what was said it amounts to little more than the statement of facts already related, namely, that by the terms of the certificates, and the laws of complainant, the certificates, if in force at the death of either, would benefit either the survivor or the children, and, if the survivor, then, indirectly, the children also. This testimony gains no extended meaning from the fact that either paid assessments levied upon the other at the cost of personal labor and inconvenience. In doing so, especially during the sickness of one of them, only ordinary self-interest was served. It is a fair, if not a necessary, inference from the testimony that the husband paid the assessments upon both certificates except upon occasion or occasions when he was ill, when his wife Minnie paid them. Nor does the testimony acquire any extended or peculiar meaning from the fact that upon the death of

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Minnie, Asa received the benefit of the fund payable according to her certificate. He was the beneficiary named in the certificate. In other words, there is nothing peculiar in the facts that a husband and wife each took out a certificate payable to the other, that either paid assessments upon both certificates, and that the husband, after the death of the wife, received, what her certificate promised him, the death benefit. They are material facts here only upon the theory that they occurred in the carrying out of mutual promises, the making of which must be otherwise established.

It seems that, in the contest made before the complainant's tribunal, the minors asserted as reason for refusing payment to the beneficiary named in the policy, that their father, the assured, was not mentally competent to make a change of beneficiaries, and they asserted no other reason. This, also, was one of the issues of fact raised by the answer. This was an issue the children could rightfully raise, since, after the death of their mother, they were, by the rules of complainant, the contract beneficiaries. *Grand Lodge A. O. U. W.* v. *McGrath*, 133 Mich. 626 (95 N. W. 739); *Grand Lodge A. O. U. W.* v. *Frank*, 133 Mich. 232 (94 N. W. 731). It is significant that both grounds for contest were not asserted before the suit was begun.

2. Assuming the mutual promises never to change beneficiaries to have been made as is claimed, upon what theory may the children enforce the contract? No promise was made to them, or any of them, no consideration for the promise moved from them. The agreement related to no fund in existence. No trust was created. I find no reason for thinking that the parties were not at liberty, at any time, to revoke their promises. It is true that after the death of the mother there could be no mutual revocation, but, unless some legal interest in the performance of the promise vested in the children when the promise of the father was made, such interest never vested.

It is the general rule in England that a third person can-

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not become entitled by the contract itself to demand the performance of any duty under the contract. Pollock, Principles of Contract (7th Ed.), p. 199. The rule, contracts creating trusts aside, is the same whether such enforcement is attempted at law or in equity. *Ibid*, p. 213. In this State the English rule has been followed when the attempted enforcement of the contract by a third person was at law. *Pipp* v. *Reynolds*, 20 Mich. 88; *Turner* v. *McCarty*, 22 Mich. 265; *Hicks* v. *McGarry*, 38 Mich. 667; *Hunt* v. *Strew*, 39 Mich. 368; *Hidden* v. *Chappel*, 48 Mich. 527 (12 N. W. 687); *Edwards* v. *Clement*, 81 Mich. 513 (45 N. W. 1107); *Linneman* v. *Moross' Estate*, 98 Mich. 178 (57 N. W. 103, 39 Am. St. Rep. 528).

There is a well-recognized exception to the rule in England as to the provisions contained in a settlement made upon and in consideration of marriage, for the benefit of children to be born of the marriage. Whether there is, in that jurisdiction, any other or further exception may be doubted. *Tweddle* v. *Atkinson*, 1 B. & S. 393, 30 L. J. Q. B. 265. See, also, *Exchange Bank of St. Louis* v. *Rice*, 107 Mass. 37 (9 Am. Rep. 1); *Marston* v. *Bigelow*, 150 Mass. 45 (22 N. E. 71, 5 L. R. A. 43); and, generally, Pollock, Principles of Contract (7th Ed.), chapter 5; Harriman on Contracts (2d Ed.), pp. 212–216; 9 Cyc. pp. 374–385. The contention of appellees is that the principle underlying the English exception to the rule should be extended, at least in equity, so as to support the enforcement by children of contracts made by their father or mother, with each other or with strangers, for their benefit, and *Buchanan* v. *Tilden*, 158 N. Y. 109 (52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454), is cited and relied upon.

The courts of New York do not follow the English rule. In the case cited, a woman was permitted to recover, in an action at law, a sum of money which defendant had promised her husband to pay to her upon a consideration moving from the husband and others to the defendant

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and others. The sum of money promised to be paid to the wife was $50,000. The trial court gave her judgment. The appellate division of the Supreme Court reversed the judgment and the court of appeals reversed the appellate division by a vote of four to three of the judges. It will be discovered from the opinion that the points involved, and concerning which the judges disagreed, were whether the promise made by the defendant to the third person was upon a valid consideration, and whether the promisee had a legal interest that the contract be performed in favor of the plaintiff. If these things appeared, then, under the rule laid down in *Lawrence* v. *Fox*, 20 N. Y. 268, and *Durnherr* v. *Rau*, 135 N. Y. 219 (32 N. E. 49), plaintiff was entitled to enforce the contract at law. The majority opinion concludes with the statement, that—

"The case at bar is decided upon its peculiar facts. We do not hold that the mere relation of husband and wife alone constituted a sufficient consideration to enable the plaintiff to maintain this action. We deem it unnecessary to decide that question at this time. What we do hold is that the equities of the plaintiff" [her interest as an adopted child who, in conscience and equity, but not legally, was entitled to a share of the fund sought to be recovered and which was recovered by defendent with the aid of plaintiff's husband] "were such that, when considered in connection with the duty of her husband to provide for her future, and with that purpose in view the money was procured for the defendant to institute and pursue the necessary litigation to secure the fund to which her equities related, they, all taken together, were sufficient to sustain the plaintiff's action."

It cannot be said that the decision sustains appellees' contention, and we are referred to none in which the general rule in force here is recognized which does sustain it. The general rule in this State is regarded as settled. I see no reason for saying that it is not the same in proceedings at law and in equity. To what extent and under what circumstances an exception to the rule should be recognized in favor of the enforcement by children of contracts

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(other than those creating trusts), made for their direct or indirect benefit, by persons nearly related to them or by those sustaining the duty to provide for them, is a subject which needs to be considered no further than this, that the mutual promises of a father and mother, who each hold the certificate of a beneficial association in which the other is named as beneficiary, never to change the beneficiaries so named, create no legal or equitable interest of the children in the fund derived on the death of the surviving parent, although, if no such change had been made, they would have been the legal beneficiaries, and although the mutual promises of the parents contemplated that in such case they should be the legal beneficiaries.

The case presented is ruled precisely as it would be ruled if the children, in the lifetime of the father, were seeking specific performance of the alleged contract or an injunction to restrain a threatened change of beneficiaries. It may be added, although the suggestion relates rather to the facts than to the law, that the children, appellees, appear to have no particular claim, as against the appellant, to equitable consideration. It is not claimed that appellant knew of any arrangement between her husband and his former wife about life insurance. His relation to her is a sufficient reason for insuring his life for her benefit. If, instead of pursuing the method of substituting one beneficiary for another, he had refused to pay assessments, thus permitting the original certificate to lapse, and procured one in which appellant was named as beneficiary, it is clear that her right to any fund derived therefrom and from his death, would be unassailable.

The decree below, except as to the provision for costs to complainant, is reversed, and a decree will be entered in this court for the payment of the fund to the appellant, who will recover of the appellees the costs of both courts.

BIRD, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

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TAYLOR *v.* HOME TELEPHONE CO.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — VOLENTI NON FIT INJURIA.

In an action for negligent injuries sustained by plaintiff, a caretaker employed by an athletic association, caused by a stream of water that burst from the city water main, and was forced into a second-story window, which plaintiff endeavored to close in order to protect the property, her act being voluntary, in the presence of an obvious danger, constituted such contributory negligence as to preclude any recovery for the alleged negligence of defendant in damaging the main.

Error to Wayne; Donovan, J. Submitted October 12, 1910. (Docket No. 47.) Decided December 7, 1910.

Case by Theresa V. Taylor against the Home Telephone Company for a negligent injury. A judgment for defendant on a verdict directed by the court, is reviewed by plaintiff on writ of error. Affirmed.

Wesley L. Nutten, for appellant.

Thomas A. E. Weadock, for appellee.

It is alleged in the declaration that on July 29, 1907, the defendant's employés in making an excavation in an alley in the city of Detroit negligently removed a service cock from an 8-inch city water main carrying pressure, laid 4½ feet under ground, which they had uncovered. As a consequence water escaped and was forced into the second-story open window of a building into apartments occupied by a women's athletic association. Plaintiff, who was housekeeper or caretaker of the apartments, attempted to close the window, was knocked down by the force of the stream of water, her clothing soaked with water, and as a consequence she was chilled, became sick and disordered,

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was afflicted with rheumatism, etc., from which she still suffers, and has been obliged to lay out money in an effort to cure herself. The plea is the general issue, with notice of special defenses, which, because of the course pursued at the trial, need not be referred to.

At the trial plaintiff gave testimony tending to prove the said allegations concerning her conduct and its consequences, and gave as the reason for exposing herself her desire to prevent injury to the room and its contents. Ill effects from her wetting appeared, she said, the night succeeding the occurrence. A witness, describing himself as an emergency man for the city water department, testified that he repaired the pipe, a five-eighths inch opening, from which a plug, without a thread—evidently driven in—had been expelled or removed. It does not appear that other testimony was introduced, but the following colloquy took place:

"*The Court:* Have you any other testimony?

"*Mr. Nutten:* Dr. Hodge.

"*The Court:* We do not want the doctor yet.

"*Mr. Weadock* to *Mr. Nutten:* Is that all the testimony in support of your case, except the medical testimony?

"*Mr. Nutten:* No, sir; I did not subpœna them. I knew the witnesses I had here.

"*The Court:* The main thing is this: Can you make the main case of the main witness, Mrs. Taylor, substantially any different from what you have now?

"*Mr. Nutten:* Yes, I think so.

"*Mr. Weadock:* How can he contradict his own witness' statement?

"*Mr. Nutten:* I do not want to do that.

"*The Court:* All you can do, as I take it, is to give cumulative evidence. That is more of the same kind of the order already given, the water pipe was opened and that it flooded these rooms, is that right?

"*Mr. Nutten:* I want to show what kind of a plug was in there by the water board. I want to show what the condition was. I want to show that there were certain conditions existing there that would warn this defendant that that plug was liable to come out, if not handled in proper condition.

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"*The Court:* That does not change the case one iota. In our Supreme Court, in a decision by Judge Campbell, they have held that before. Where a woman went to rescue a pet horse and take it out of a burning barn and where they could see their danger, and this happened in broad daylight. The law will not recompense a known danger. People walk into danger and take their chances. I can give you a case absolutely. This woman walked into danger.

"*Mr. Nutten:* This case comes under the rule I will call your attention to, found in some other Michigan cases.

"*The Court:* I will take them right now.

"*Mr. Weadock:* It seems to me under the statement of counsel the case is out.

"*Mr. Nutten:* No, sir.

"*Mr. Weadock:* If you will state why, I think I will admit it.

"*Mr. Nutten:* I will attempt to show that these people in digging around this service cock knocked it out negligently.

"*Mr. Weadock:* Suppose they did?

"*Mr. Nutten:* If that is conceded.

"*Mr. Weadock:* No, sir; not conceded, only I am saying, supposing it for the sake of the argument.

"*The Court:* I have the case where the woman had more reason than this; endangering her pet horse.

"*Mr. Weadock:* If this woman had stayed where she was, she would have been absolutely safe.

"*Mr. Nutten:* Here was an emergency that suddenly came upon this woman. She was there in the orderly performance of her duty.

"*Mr. Weadock:* If that is your case, then I move to direct a verdict for the defendant, because the plaintiff's own testimony shows she has no case. Now, it is squarely before the court."

After hearing counsel, the court directed a verdict for defendant, and judgment was entered on the verdict. Proper exceptions were taken to the ruling of the court, and the case presents the question whether, conceding the defendant to have been negligent as alleged, plaintiff, upon her testimony, is entitled to take the verdict of a jury.

OSTRANDER, J. (*after stating the facts*). The plain-

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tiff's act was voluntary, the wetting she got was inevitable. Did she, as defendant contends, assume all the consequences of the wetting, whatever they might be? The principle expressed in the maxim, "*Volenti non fit injuria*," is subject to qualifications, which are sometimes stated as qualifications of the rule, but are quite as often recognized as rules in determining the proximate cause of an injury and the contributory negligence of the injured person. Courts have frequently refused to so apply the principle as to deny to one who has at actual risk of injury sought to save property or a person from damage or destruction the right to recover damages. A valuable collection of authorities appears in the note to *Fisher* v. *Railway Co.* (Va.), 2 L. R. A. (N. S.) 954. See, also, 1 Thompson on Law of Negligence, § 185 *et seq.*

In *Cook* v. *Johnston*, 58 Mich. 437 (25 N. W. 388, 55 Am. Rep. 703), the plaintiff entered a burning shed to release a horse belonging to her husband and was burned. Under the circumstances, and as matter of law, the right to recover was denied. In *Harris* v. *Township of Clinton*, 64 Mich. 447, 455 (31 N. W. 425, 428, 8 Am. St. Rep. 842), it is said, citing *Cook* v. *Johnston* and other cases:

"If the danger is known, and can be easily avoided, a peril voluntarily and unnecessarily assumed may constitute such contributory negligence as would preclude a recovery."

It was held that the question was properly submitted to a jury. In *La Duke* v. *Township of Exeter*, 97 Mich. 450 (56 N. W. 851, 37 Am. St. Rep. 357), it appeared that plaintiff deliberately attempted to prevent the struggles of his horse, whose feet and legs were fast in a defective bridge. There was, of course, some risk of injury from the movements of the animal. How much risk depended upon many circumstances. He was injured by the horse, and the contention that the negligence of defendant was not the proximate cause of his injury was overruled. In *Milbourne* v. *Power Station Co.*, 140 Mich. 316, 321 (103 N. W. 821, 823, 70 L. R. A. 600), it is said:

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"The fact that one takes a risk in the performance of a duty is a circumstance entitled to great weight in determining whether his conduct was negligent."

In these, as in all of the cases which have been examined, there was, or was supposed to be, a chance, more or less probable, of escaping any direct consequences of defendant's negligence. In the case at bar no such chance existed or could have been supposed to exist. May the plaintiff say that the consequences other than a mere wetting were not anticipated by her, and therefore the peril of them was not assumed, and at the same time insist that they were the direct result of defendant's negligence—of the single occurrence—and defendant must respond in damages? We are of opinion that she may not do so, and that the maxim referred to must be applied.

The judgment is affirmed.

BIRD, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

KRETTNICH *v.* DETROIT CHEMICAL WORKS.

MASTER AND SERVANT—PERSONAL INJURIES—DUTY TO INSPECT.

Testimony, in an action for injuries sustained by the breaking of a defective jar holding nitric acid, that defendant made only a visual inspection, that a latent defect existed, which would have been discoverable if defendant had inspected the jar by striking, and that it is necessary to inspect in that way, warranted the submission to the jury of defendant's negligence.

Error to Wayne; Mandell, J. Submitted October 14, 1910. (Docket No. 64.) Decided December 7, 1910.

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Case by John Krettnich against the Detroit Chemical Works for personal injuries. Judgment for plaintiff; defendant brings error. Affirmed.

Willard E. Warner, for appellant.

Sloman & Sloman (*Louis McClear*, of counsel), for appellee.

BLAIR, J. This is an action to recover damages suffered while moving a nitric acid jar through the escape of nitric acid from another jar, due, as plaintiff's evidence tended to show, to a latent defect in the jar, but, as defendant contended, to a collision between the two jars.

Plaintiff's declaration contains, among other averments, the following:

"That the nitric acid so manufactured by said defendant is a dangerous chemical or article to come in contact with, and, when exposed, gives out noxious and dangerous fumes, and rapidly eats its way into objects that it comes in contact with and renders vessels or receptacles in which it is placed, including crocks or jars, brittle, so that a very slight jar or concussion thereof will cause such crock or jar to break, and release its contents of nitric acid, more especially when such vessel or receptacle is full or nearly full. That, when the acid comes in contact with the body, it burns the flesh and rapidly eats its way therein, all of which facts were then and there well known to said defendant. * * * That the acid pit, at the time of the committing of the grievances hereinafter mentioned, contained three large, heavy jars or crocks or receptacles used by said defendant for storing nitric acid, and which in height were almost level with the top of said pit and had a capacity of about 250 gallons of nitric acid each, and some of which were at the time aforesaid partially filled and others nearly full thereof, and which while containing acid were kept covered to prevent the noxious fumes from escaping. * * * That it then and there became and was the duty of said defendant to furnish safe and sound crocks, jars, or receptacles for the storage of nitric acid while the same were in said pit, and to exercise great caution to ascertain whether the same had not become brittle and weakened by reason of the action of the

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nitric acid contained therein, and to cause due inspection to be made thereof at reasonable intervals, so that defects and weakness therein due to the action of nitric acid could be discovered and thereby guard against the use of brittle, unsound, or defective crocks, jars, or receptacles of said description. * * * That on the day and year last aforesaid, pursuant to said direction and request, plaintiff entered said pit and proceeded to move one of the crocks, jars, or receptacles therein, which was nearly filled with nitric acid, from one part of said pit to another, and while engaged in so moving the same, without fault or negligence on his part, a crock, jar, or receptacle (which was then and there brittle and defective, but which defects were then and there unknown to plaintiff and were well known to the defendant, or, if not known, should have been, in the exercise of due and proper care on his part) cracked and broke, and a section thereof fell out, and released the contents of nitric acid therein, which ran in and over the said pit, and onto, over, and against said plaintiff," etc.

The important question in the case, and in our opinion the only one requiring consideration, is whether there was any testimony whatever to warrant submitting to the jury whether defendant failed to properly perform its alleged duty of inspection. Three witnesses testified that the jars did not come in contact. No witness testified that they did strike except that the plaintiff, after testifying twice that they did not strike, used the following language:

"*Q.* Just before the jar broke you hollered 'Whoa,' to the men, and they loosened up on the ropes?

"*A.* No; I guess we were moving them at the time they struck—when that piece fell out.

"*Q.* When they struck you said?

"*A.* No; when this piece fell out."

The second witness, Breitenbach, who swore positively that the jars did not strike, had made several statements to defendant's officers prior to the trial to the effect that they did strike. The third witness, Phipps, testified positively that the jars did not strike. Breitenbach and Phipps testified that they examined the jar the second day after

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the accident, and the break began about six inches from the bottom and was dark for about six inches from the bottom, and the rest, according to Breitenbach:

"* * * was a clear break. It didn't take much to notice it was a clear break. It was lighter than the other. Lighter the rest of the way around. * * *

"*Q.* What caused the darkness?

"*A.* There is something I don't know. It looked to me like an old break.

"*Q.* What color was it?

"*A.* It was light gray.

"*Q.* What color was the jar?

"*A.* Light, a lightish color.

"*Q.* A light brown?

"*A.* Light brown, you would call it a light brown, a very light brown, more—

"*Q.* If it was dirt from the floor that had spattered around the bottom of the jar, it would make it darker than the clean part?

"*A.* Well, it would not bring it that same color, I don't believe.

"*Q.* It might do it?

"*A.* It might do it, but I don't believe it would. I don't think it would. I am positive it would not."

Phipps testified:

"After the accident, they flushed the pit with water through a hose which was left running, and the pit was cleaned out. After the water was out, I helped to take the crock out. Breitenbach and I broke it up in the pit, and the pieces were thrown through the doorway. I examined the break. Breitenbach called my attention to it. It was rather dark in some places. At the bottom it was darker than at the top, and ran up a foot or eight inches. It looked like a new break on top, but at the bottom it didn't. The discoloration was in the whitish part of the break. It did not run up as far on the north as the south side of the break. It looked like an old break."

The testimony on the part of the defense tended to show that the jars were of the best make known, and that, if in good condition when installed, they would last indefinitely. If the jury believed the testimony of the three witnesses referred to, the jar broke without the

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direct application of any outside force and showed an old crack; and from these facts the jury might well have drawn the inference that a latent defect existed in the jar at the time it was installed.

Was it the duty of defendant to inspect, and, if so, was that duty discharged by a visual inspection? Plaintiff's expert Courtiss testified:

"I use earthenware jars and flasks for holding nitric acid. It has some effect upon earthen jars, and gradually decomposes, softens, and weakens them. The purpose of the glazing of the jars is to prevent the acid from going into the jars. If the glaze be broken off, it would naturally go into the jar, it being porous, and decompose the jar.

"Exhibit 7 looks like a piece of earthenware jar. Acid would penetrate it, if it were without the glaze. On the inside either it was just painted, or the glaze has gone away. There are little spots of glazing on it. If nitric acid were stored in it for any length of time, it would gradually decompose the glazing, and take it away. * * * The bottom part of the jar where the acid stays would be most affected.

"*Q.* Can you tell whether the jar, of which Exhibits 6 and 7 are parts and which you have examined, was well manufactured?

"*A.* Fairly well, certain impurities in that, indications of impurity, but it is not a perfect jar, the pieces I have seen. Nitric acid weighs about 88 pounds per cubic foot or 7.43 gallons, and 10 to 12 pounds per gallon. The means for testing a jar is by examination of it, and by the ring of it. Every jar that is perfect has a certain ring, a sound ring, by hitting it with a stick or hammer. If there were a crack in the jar, we could not locate it by the ring, unless at the bottom. It might ring on the top, and, if you went to the bottom, it would become dead. You might ascertain a crack. It could be located only in the bottom. Such a test should be made with an empty jar, because the water would deaden the sound. It would be possible to discover it by the ring when empty, but not when full. * * * I have tested jars to see which of two, one full and the other partly full, would break if struck together, and the one partially full would break, because there is not anything behind it to prevent the con-

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cussion at the point where it struck. From my experience in handling nitric acid when stored in crocks under the circumstances described, I would think it would be necessary to inspect them. We were instructed to do it."

All of the witnesses testified that there was no patent defect in the jar and defendant's testimony indicates that no inspection except a visual one was ever made. As to why no other than a visual inspection was made defendant's secretary testified:

"If these crocks had not developed a leak within 60 days from the time they were filled, they were good for 25 years."

Defendant's treasurer testified:

"From my experience, I would say that the life of that jar which broke, for the purpose for which it was used, is from 25 to 50 years, in fact, interminable for the storage of nitric acid, with no wearout to it. I do not consider that any further inspection or examination of that jar from the time when it was installed in 1905 was necessary, it having been examined at that time and found in perfect condition. It had not been changed since it was installed."

Whether there was any necessity for other than visual inspection became, under the testimony, a question of fact for the jury, which was properly submitted to them in a very fair and impartial charge which fully guarded the rights of defendant. The verdict was neither against the law nor the evidence, nor can we say that it was so clearly excessive as to justify a reversal.

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, BROOKE, and STONE, JJ., concurred.

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DANIELS v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. PROCESS—MOTIONS—SERVICE—SUFFICIENCY.
   Disputed questions of fact are not triable on motion and affidavits as to the sufficiency of service of process.

2. SAME.
   But where no question of fact is raised, the court will dispose of a motion to quash service of process, for the alleged reason, that defendant, a foreign corporation, was improperly served.

3. SAME—STATUTES.
   Before the enactment of Act No. 3, Pub. Acts 1909, an action against a nonresident corporation might be commenced by attachment and seizure of property, under 3 Comp. Laws, § 10011.

4. INTERNATIONAL LAW—FOREIGN STATUTE.
   The court cannot take judicial notice of a statute of limitations of the Dominion of Canada; it must be proved.

5. ACTIONS — PERSONAL INJURIES — CARRIERS — CONSTITUTIONAL LAW.
   An action against a carrier for negligent injuries sustained in a foreign jurisdiction, is transitory, and may be tried by the courts of this State.

6. STATUTES—CAUSE OF ACTION—REMEDIES.
   The said statute merely broadens a remedy and in no way affects the cause of action.

7. CORPORATIONS—RAILROADS—SERVICE OF PROCESS.
   A foreign railroad company, lawfully doing business in this State, is subject to such changes as may, from time to time, be made in the law touching service of process.

8. CONSTITUTIONAL LAW—PROCESS—FOREIGN CORPORATIONS.
   Act No. 3, Pub. Acts 1909, which permits service of process on the agent of a foreign corporation, in cases arising outside the jurisdiction, merely gives a remedy which did not exist under 3 Comp. Laws, §§ 10442, 10443, without affecting the vested rights of the foreign corporation, and the act is constitutional and applies to a cause of action that was in existence when the statute went into effect.

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Certiorari to Clinton; Searl, J. Submitted October 11, 1910. (Docket No. 31.) Decided December 7, 1910.

Case by George B. Daniels against the Detroit, Grand Haven & Milwaukee Railway Company, the Grand Trunk Western Railway Company, and the Grand Trunk Railway Company of Canada. The defendant, the Grand Trunk Western Railway Company, filed a motion to quash the service of plaintiff's declaration. An order denying the motion is reviewed by said defendant on writ of certiorari. Affirmed.

Harrison Geer, for appellant.

Lyon & Moinet, for appellee.

STONE, J. Suit was brought to recover damages for injuries which plaintiff claims that he received in a wreck in Canada on September 3, 1908, while a passenger on a train of the Grand Trunk Railway Company of Canada between the stations of Princeton and Gobles. At that time, as well as at the time of the commencement of this suit (November 3, 1909), plaintiff resided in Clinton county, Mich. He commenced the action by declaration in the Clinton circuit court. Service was made on the same day on the defendant Detroit, Grand Haven & Milwaukee Railway Company, within said county, and proof of such service was on that day made and filed in the cause. On November 4, 1909, service was made on the defendant the Grand Trunk Western Railway Company, and due proof of that service was filed November 6, 1909. On November 5, 1909, service was made on the defendant the Grand Trunk Railway Company of Canada by delivering a copy of the declaration, rule to plead, and notice, to George W. Watson, its ticket agent, at 124 Woodward avenue, Detroit, Mich., to secure jurisdiction of the last-named company, and on the following day proof of such service was made and filed in the cause.

The first two named companies caused their appearance

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to be entered in said cause. The Grand Trunk Railway Company of Canada appeared specially in said suit and moved the court, upon affidavit attached to said motion, to dismiss the suit for the reason that said company is a foreign corporation, and the plaintiff's alleged cause of action accrued in the Dominion of Canada, if at all, and not in the State of Michigan. The affidavit in support of the motion, after stating that the plaintiff's alleged cause of action accrued through derailment of said defendant's passenger train near Princeton, Ontario, Dominion of Canada, on September 3, 1908, proceeds as follows:

"This deponent further says that the Grand Trunk Railway Company of Canada * * * is a foreign corporation, and was a foreign corporation on the 2d and 3d days of September, 1908; that it is organized and exists under the laws of the Dominion of Canada, and is a subject of King Edward VII, and it is not now, and never has been, a corporation organized and existing under the laws of the State of Michigan."

It appears by an affidavit filed on behalf of the plaintiff, at the hearing of the motion, that at the time of the service in question, said defendant the Grand Trunk Railway Company of Canada was maintaining two ticket offices in the city of Detroit, one at the so-called Grand Trunk station at the foot of Brush street, and one at 124 Woodward avenue; that it had maintained such offices since prior to September 3, 1908, and that said defendant, at its Woodward avenue ticket office, sold a ticket over its line from Detroit, Mich., to Tecumseh, Canada, at the very time that service aforesaid was made upon it. This court held in *Sherrill* v. *Railway Co.*, 161 Mich. 495 (126 N. W. 830), where a similar question was raised, that it would refuse, in such a proceeding, to try disputed questions of fact upon affidavits, and that the proper practice was to frame an issue by a proper plea. As it appears, however, by an examination of the affidavits filed in this case, that there are no disputed questions of fact raised, we shall proceed to dispose of the question here presented.

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The circuit judge found that no question was raised as to the agency of Watson, and no question of that kind appears in the record or brief of appellant.

The sole contention urged by appellant is "that the circuit judge erred in overruling defendant's motion and holding the service of the declaration good as to the Grand Trunk Railway Company of Canada, and in entering the order," overruling the motion. The case is here upon certiorari.

It is the claim of the appellee, plaintiff below, that he is entitled to bring suit in the circuit court for the county of Clinton, where he resides, although the cause of action accrued outside of the State of Michigan, and the defendant is a foreign corporation, under Act No. 3, Pub. Acts 1909, the same being an amendment of section 10442, 3 Comp. Laws; the act as amended reading as follows:

"SECTION 1. In cases where the plaintiff is a resident of the State of Michigan, suits may be commenced at law or in equity in the circuit court for any county in this State where the plaintiff resides or where service of process may be had, and suits at law may be commenced before any justice of the peace in such county, against any corporation not organized under the laws of this State, by service of a summons, declaration or chancery subpœna, within the State of Michigan, upon any officer or agent of the corporation, or upon the conductor of any railroad train, or upon the master of any vessel belonging to or in the service of the corporation against which the cause of action has accrued. And where the plaintiff is a nonresident of the State of Michigan, suits may be commenced in like manner against such corporations, in all cases where the cause of action accrued within the State of Michigan: *Provided*, that in all cases, except before justices of the peace, no judgment shall be rendered for sixty days after the commencement of suit, and the plaintiff shall, within thirty days after commencement of suit, send notice by registered letter to the corporation defendant at its home office.

"SEC. 2. That when the cause of action has accrued prior to the passage of this act, suit may be brought as provided in the first section of this act: *Provided*, that the cause of action at the time such suit is brought would

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not have been barred by the statute of limitations had such corporation been organized within this State."

It is conceded that prior to the amendment of 1909 the plaintiff below could not have brought suit by declaration in any circuit court of Michigan and got valid service upon said foreign corporation, so as to have entitled him to recover a personal judgment against it. He could, however, at the time of the alleged injury, have commenced his suit by attachment, and have seized the property of the defendant corporation, sufficient to satisfy his claim for damages, under the provisions of section 10011, 3 Comp. Laws.

Counsel for appellant makes the claim in his brief that, under the law of Canada where the cause of action accrued, if at all, suit must be commenced within one year, and that plaintiff's cause of action would have outlawed on September 3, 1909, and he argues that the corporation had a vested right in its defense, which could not be taken away. A complete answer to this point is that the question is not raised in the record. We cannot consider a question not presented in the record. There was not a scintilla of proof before the lower court that there is any statute of limitations whatever as to this sort of action, or any kind of action whatever, in the Dominion of Canada. We cannot take judicial notice of the existence of a foreign statute. This court held in *Chapman* v. *Colby Bros. & Co.*, 47 Mich. 46, 51 (10 N. W. 74), that where a foreign law is in question, there can be nothing known of its purport until it is proved—citing *Kermott* v. *Ayer*, 11 Mich. 181. In varying language the same rule has been held and applied in many cases; the later cases being *Phelps* v. *Loan Ass'n*, 121 Mich. 343, 354 (80 N. W. 120); *Schroeder* v. *Boyce*, 127 Mich. 33–36 (86 N. W. 387). We must decline therefore to consider the claim of the statute of limitations.

The amendment of 1909 eliminated the provision that the cause of action must arise within the State of Michigan,

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in order to entitle the plaintiff to make service upon a foreign corporation. This cause of action was transitory. The circuit court for the county of Clinton is a court of general jurisdiction, and as such had jurisdiction over the subject-matter of this suit under the provisions of the Constitution. See Const. 1850, art. 6, § 8; Const. 1909, art. 7, § 10; *Atkins* v. *Borstler*, 46 Mich. 552 (9 N. W. 850); *Thompson* v. *Benefit Ass'n*, 52 Mich. 522 (18 N. W. 247); *Cofrode* v. *Circuit Judge*, 79 Mich. 332–339, (44 N. W. 623, 7 L. R. A. 511); *Sleight* v. *Swanson*, 127 Mich. 436, 438 (86 N. W. 1010).

There can be no question that if plaintiff below had, at any time after the alleged injury, commenced suit in the Clinton circuit court against all of the defendants, and had made service upon the other two defendants, as he did in this case, and appellant had appeared in the case, and a judgment had been rendered therein, such judgment would have been binding upon all of the parties. That court would have had jurisdiction over the plaintiff because he was a resident of that county and voluntarily went into that court; it would have had jurisdiction over the subject-matter, because the cause of action was transitory, and it was a court of general jurisdiction; and if appellant had voluntarily appeared, it would have had jurisdiction over the person of appellant, and any judgment rendered therein would have been binding upon the parties.

We have shown that service might have been had by attachment. Although the cause of action accrued in Canada, yet it was a personal right of action, and went with the plaintiff when he returned to his home in Clinton county, Mich. If the defendants were guilty of actionable negligence, as alleged, the plaintiff's cause of action had become complete the moment the injury was received, and remained complete when suit was brought on November 3, 1909. The act of 1909, changing the law providing for the service of process, had nothing to do with the plaintiff's right of action. That statute relates

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only to the remedy, in that it prescribes and regulates a mere matter of procedure; and in such matters a party has no vested right. The amendatory act of 1909 merely broadens the remedy, by still leaving plaintiff his remedy by attachment, and adding thereto a remedy by vicarious service and a personal judgment against appellant. If appellant was doing business in the State with the consent of the State, as it probably was, then it was subject to such changes as should, from time to time, be made in the law of the State touching the service of process upon it. Upon the subject of vested rights, a clear distinction has been made by this court between the defense itself, and the mere remedy or procedure.

We cannot better deal with the authorities cited by counsel than to quote with approval from the opinion of the learned circuit judge as follows:

"I come now to the question whether or not a resident plaintiff may make such service in a case where the cause of action accrued before the act of 1909 took effect. In *Philip* v. *Heraty*, 147 Mich. 473 (111 N. W. 93, 118 Am. St. Rep. 554), cited by appellant, it was held that Act 280, Pub. Acts 1905, extending the right of action for wrongful death to the person in good faith sustaining the marriage relation to the person killed, etc., creates a cause of action where none existed before and could not be applied to a past transaction. This was upon the ground that under no circumstances could the plaintiff have sustained her cause of action in any court except by reason of the statute, and it therefore did not relate to the remedy, but created a cause of action which did not exist before and had prospective operation only. In *City of Grand Rapids* v. *Railway Co.*, 130 Mich. 238 (89 N. W. 932, 97 Am. St. Rep. 473), it was held that Act 443, Local Acts 1895, seeking to make railroads liable for a paving tax theretofore levied, was invalid because it attempted to create a personal obligation to pay taxes which was not a personal obligation before. This simply created a new cause of action. In *Davis* v. *Railroad Co.*, 147 Mich. 479 (111 N. W. 76), Act 89, Pub. Acts 1895, was held not applicable to a case pending when the act took effect, because it applied to cases only which are 'hereafter prosecuted.'

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"Section 10443 expressly provides that suit may be brought as provided in section 10442, 'when the cause of action has accrued prior to the passage of this act.' This was a part of the statute before section 10442 was changed by the 1909 amendment of the orignal act, entitled, 'An act to provide for suits against foreign corporations in the courts of this State.' I must presume that the legislature had section 10443 in mind when the amendment was enacted, and I must construe it the same as though it was passed at the same time and as a part of the amendment. So it will be plainly seen that it was the intention of the legislature that this amended act should apply to cases where, like the one at bar, the cause of action had accrued before the act took effect. The amended act, therefore, applies to this case and service is valid providing the law is constitutional. In *Judd* v. *Judd*, 125 Mich. 228 (84 N. W. 134), it was held that Act No. 230, Pub. Acts 1899, giving the court power to punish for contempt one who refuses to comply with the order of the court regarding alimony, relates to the remedy only and applies to a case where the decree of divorce and for alimony was rendered prior to the act.

"Similar laws changing the remedy have been upheld in the following cases: *Joy* v. *Thompson*, 1 Doug. 373; *Rockwell* v. *Hubbell's Adm'rs*, 2 Doug. (Mich.) 197 (45 Am. Dec. 246); *Hanes & Co.* v. *Wadey*, 73 Mich. 178 (41 N. W. 222, 2 L. R. A. 498); *In re Miller*, 110 Mich. 676 (68 N. W. 990, 34 L. R. A. 398, 64 Am. St. Rep. 376); *Semer* v. *Auditor General*, 133 Mich. 569 (95 N. W. 732); *Rosenthal* v. *Wehe*, 58 Wis. 621 (17 N. W. 318); *Green* v. *Anderson*, 39 Miss. 359; *Murray* v. *Mattison* [63 Vt. 479], 21 Atl. 532; *Hine* v. *Belden*, 27 Conn. 384; *Henschall* v. *Schmidtz*, 50 Mo. 454; *Roberts* v. *Thomson*, 28 Ill. 79; *Fisher* v. *Hervey*, 6 Colo. 16.

"Plaintiff had a cause of action when this amendment took effect. The defendant, the Grand Trunk Railway Company of Canada, if liable at all to him, is liable to no greater extent than before. But prior to the passage of this statute he had no remedy permitting him to get service in Michigan. This statute changed the remedy only and did not create any new cause of action, and the case is therefore distinguished from *Philip* v. *Heraty*, and that line of cases. This defendant is a foreign corporation doing business in this State under our statute, and so long as no vested right is taken away from it, it

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cannot complain of a change in our statutes which may affect it. The statute, in my judgment, is constitutional and the service valid."

The order of the circuit court is affirmed.

BIRD, C. J., and OSTRANDER, BROOKE, and BLAIR, JJ., concurred.

DANIELS *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

Certiorari to Clinton; Searl, J. Submitted October 11, 1910. (Docket No. 32.) Decided December 7, 1910.

Case by Alice L. Daniels against the Detroit, Grand Haven & Milwaukee Railway Company, the Grand Trunk Western Railway Company, and the Grand Trunk Railway Company of Canada. An order denying a motion to quash the service of process as to the Grand Trunk Railway Company of Canada is reviewed by said defendant on writ of certiorari. Affirmed.

Harrison Geer, for appellant.

Lyon & Moinet, for appellee.

STONE, J. The facts in this case are like those in *George B. Daniels* v. Same defendants, *ante*, 468 (128 N. W. 797), and the opinion in that case applies and governs here.

The order of the circuit court is affirmed.

BIRD, C. J., and OSTRANDER, BROOKE, and BLAIR, JJ., concurred.

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MASLEN v. ANDERSON.

1. EQUITY—DIVORCE—JURISDICTION.
   The jurisdiction of the circuit court, in chancery, in divorce proceedings, is strictly statutory, and the court has no inherent power to decree permanent alimony.

2. SAME—STATUTES—LIEN FOR ALIMONY—MINOR CHILDREN.
   While the statutes give the court authority to grant alimony to the wife for the support of herself and minor children, and to create a lien against the husband's property to secure its payment, they confer no power to decree the payment of any sum to the children on their reaching majority, or even during minority, or to create a lien to secure the payment of such award.

3. SAME—HUSBAND AND WIFE—DIVORCE.
   In such special proceedings as divorce and partition, the courts must be considered as of limited and special jurisdiction, concerning which no such presumption is indulged as prevails in actions at common law or suits under the general equitable jurisdiction.

4. SAME—JURISDICTION—CONSENT.
   Parties cannot confer jurisdiction over a subject matter, by consent, upon a tribunal from which the law has withheld it.

5. SAME—DIVORCE—ALIMONY—SUPPORT OF CHILDREN.
   A decree, entered by consent of the defendant in divorce proceedings, providing for the payment of a stipulated sum to the wife's mother, and certain sums in a lump to the children at their majority, and creating a lien on real estate to secure the payment of the same, exceeds the jurisdiction of the court, and such provisions are void and cannot operate as a family settlement.

Appeal from Wayne; Murphy, J. Submitted October 14, 1910. (Docket No. 67.) Decided December 7, 1910.

Bill by Frank A. Maslen, executor of the estate of Andrew Anderson, deceased, to remove a cloud from the title to real property. From a decree for defendants, complainant appeals. Reversed.

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William C. Stuart (*C. K. Latham*, of counsel), for complainant.

Wilkinson, Post & Oxtoby, for defendants.

STONE, J. The complainant is the executor of the last will and testament of Andrew Anderson, deceased, who died in the city of Windsor, Province of Ontario, on the 10th day of July, 1905. The bill herein was filed to remove an alleged cloud upon the title to real estate, created by the terms of a certain decree of divorce hereinafter referred to.

The defendants are Louisa A. Anderson, the divorced wife of said Andrew Anderson, their children Ida Anderson, Stella Anderson, George A. Anderson, and Lillian Anderson, and the mother of said Louisa A. Anderson, namely, Louise Gassman. On the 11th day of May, 1898, the defendant Louisa A. Anderson filed in the circuit court for the county of Wayne, in chancery, a bill for divorce against her husband, Andrew Anderson; both parties being at that time residents of the city of Detroit. There was personal service of a subpœna upon the defendant therein. The underwriting of the subpœna advised him that "a personal decree is sought against the defendant for alimony, and this bill is filed to reach interests in property." Andrew Anderson did not enter his appearance in the cause, and the bill was duly taken as confessed. Proofs having been taken before a commissioner, the case came on for a hearing before the circuit judge. The decree was signed and entered September 17, 1898. It granted a divorce from the bonds of matrimony as prayed for, and gave the care and custody of the four children, all of whom were then minors, to the complainant therein. The other terms of the said decree are as follows:

"(3) As alimony, in addition to certain property, the same consisting of all household goods of said parties, a house and lot on Harsen's Island, a house and lot on Wabash avenue and a house and lot on Hudson avenue

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in the city of Detroit (each of said last two lots being encumbered by a mortgage) transferred and conveyed by the said defendant to the said complainant, he, the said defendant, Andrew Anderson, shall pay to the said complainant, the said Louisa A. Anderson, monthly in advance the sum of $90.00 for which the said Louisa A. Anderson shall provide for the entire support, maintenance and education, in all particulars, of, and for herself and the four children of said parties above mentioned and named. Provided, however, as each or any of said children depart from and leave the home of said complainant, or are not provided for, maintained and supported by her at home, or as any or each arrives at the age of majority, then, and in that event, the sum of $10.00 per month, for each child not maintained and supported by complainant at her home, shall be deducted from the monthly payments to be made to complainant as aforesaid; and, provided, further, that all earnings of each or any of said children by reason of employment not exceeding $10.00 per month, shall be applied on the monthly payments; and, provided, further, that the monthly payments to the said complainant shall at no time be less than the sum of $65.00 per month; and, provided, further, the said monthly payments as aforesaid shall continue during the life of said complainant, but in the event of her remarriage, the same shall cease.

"And further, if complainant shall provide for and maintain Mrs. Gassman, at her, complainant's, home, the defendant shall pay complainant the sum of $10.00 each month during the continuance thereof.

"(4) As a security for the payment of the alimony hereinbefore provided for, the same is decreed to be, and constitute a lien upon all the property the defendant may at any time possess; no lien shall, however, be created or attach on any such property except in the event of the neglect and failure of the said defendant to pay the alimony as hereinbefore provided; and further, in the event of the death of said defendant, the said alimony herein provided to be paid, shall be, and constitute a lien upon the property of the estate of said defendant, and subject to the provisions herein provided.

"(5) In pursuance of, and at the suggestion, upon the question of alimony made by the defendant, and to be incorporated in this decree, at his, the defendant's, suggestion, he, the said defendant, having agreed to pay to each

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of said children, as each arrives at the age of majority, the sum of $5,000.00 each, provided, in his, the said defendant's, judgment his means and property will permit of his doing so, such judgment or payment, however, are dependent, whether to be made or not made, solely upon the judgment, decision, and determination of him, the said defendant; provided, however, in the event of the death of said defendant, such sum shall be, and the same shall constitute a lien upon the property of his estate, and to be paid to each of said children, out of the property of, and belonging to, his, the defendant's, estate."

At the time of the death of Andrew Anderson all of the children aforesaid had reached the age of 21 years, except Stella. After the granting of the decree of divorce, Andrew Anderson paid to Louisa A. Anderson, monthly, the amount provided for in said decree to be paid to her as alimony, and for the support of the minor children, but we are unable to state from the record whether or not the $10 a month, provided to be paid for the support of Mrs. Gassman, was paid during the lifetime of Andrew Anderson. Andrew Anderson married again, some time after the granting of the decree of divorce, and subsequently removed to the city of Windsor. His second wife and one child, the fruit of said second marriage, survive him.

It is the claim of the complainant, and the evidence shows, that there is not sufficient property belonging to his estate, within the State of Michigan, to pay the debts contracted by Anderson in this State, and allowed by the commissioners on claims; hence this suit. An examination of the record satisfies us that Andrew Anderson had knowledge of, and orally consented to, the terms of the decree, and that it was entered with the consent of both parties to the original case.

The bill of complaint in the divorce case alleged acts of extreme cruelty by the defendant therein, prayed for a decree of divorce from the bonds of matrimony, and that the complainant might be decreed and allowed such sum as temporary and permanent alimony as she might be equitably entitled to, and that the same might be

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secured, and decreed to be paid to her, and concluded with a prayer for general relief.

Said divorce decree is attacked by complainant upon numerous grounds, some of which we shall not find it necessary to discuss. Upon the hearing of this case in the circuit court, the complainant's bill of complaint was dismissed, and relief was granted to the defendants upon their cross-bill, and the divorce decree aforesaid was in all things sustained as a valid consent decree. The complainant has appealed.

We are satisfied with the decree of the court below, in so far as it deals with the subject of alimony to be paid to Louisa A. Anderson, except that part thereof which relates to the maintenance of Mrs. Gassman. So much of the said divorce decree as provides for the maintenance or support of Mrs. Gassman, and the entire fifth clause of said decree, we are of opinion cannot be sustained, and must be held to be invalid, for the reason that the court had no jurisdiction to make such order, or create such lien, even by the oral consent of said Andrew Anderson.

The jurisdiction of the circuit courts in chancery, in this State, in divorce proceedings, is strictly statutory. *Perkins* v. *Perkins*, 16 Mich. 162; *Baugh* v. *Baugh*, 37 Mich. 59 (26 Am. Rep. 495); *Peck* v. *Peck*, 66 Mich. 586 (33 N. W. 893); *Peck* v. *Uhl*, 66 Mich. 592 (33 N. W. 893). Such courts have no inherent power as courts of equity to decree permanent alimony at all. *Perkins* v. *Perkins*, *supra*, citing *Peltier* v. *Peltier*, Har. Ch. 19. Our statutes give the court power to grant alimony to the wife for the support of herself and minor children, and to give a lien against the property of the husband to secure the payment of the same; but they do not give the court power to decree the payment of any sum to the children upon their reaching majority, or to create a lien to secure the payment thereof. In fact, our courts of chancery in divorce cases have no power to decree that any sum be

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paid direct to the children, even during their minority. *Swiney* v. *Swiney*, 107 Mich. 459 (65 N. W. 287).

We are satisfied that in divorce proceedings our circuit courts in chancery are courts of limited and special jurisdiction; that they do not proceed according to the course of the common law, and are confined to the authority conferred upon them by statute. The language of Justice CHRISTIANCY in *Platt* v. *Stewart*, 10 Mich., at page 265, in speaking of partition suits, is equally applicable here:

"These proceedings in partition, at least as to nonresident defendants, do not come within the general or ordinary jurisdiction of courts of chancery, but the jurisdiction as to such proceedings is special and limited, and entirely dependent upon the statute. The circuit courts in chancery, though in ordinary cases of equity cognizance courts of general jurisdiction, must, we think, as to these special proceedings, be considered as courts of special and limited jurisdiction, and no presumption of jurisdiction should be indulged as in suits at common law, or ordinary suits in equity, in courts of general jurisdiction. All the necessary facts to confer jurisdiction must therefore affirmatively appear upon the record"—citing many cases in other States.

Merrill v. *Montgomery*, 25 Mich. 73; *Weimer* v. *Bunbury*, 30 Mich. 201, 219. A score of cases in this court could be cited in support of this doctrine. See note in *Wight* v. *Warner*, 1 Doug. 384.

It is a recognized doctrine that parties cannot confer jurisdiction over a subject-matter by their consent, upon courts from which the law has withheld it. *Kirkwood* v. *Hoxie*, 95 Mich. 62, 66 (54 N. W. 720, 35 Am. St. Rep. 549); *Brown* v. *Fletcher's Estate*, 146 Mich. 401, 415 (109 N. W. 686); Brown on Jurisdiction, pp. 28, 29; 11 Cyc. 693, and note. The doctrine is well stated in Brown on Jurisdiction, at page 17, in the following language:

"If a court or tribunal pronounces a judgment it has no authority to grant, or one outside of the issues made and before the court for determination, then such judgment in excess of the power conferred, is void as to such excess of its powers."

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Many cases are cited.

"If the jurisdiction of the court is derived from statutory authority, in a proceeding not in accordance with the ordinary proceedings of the common law, or the established usages of equity, then, in such cases, the rule is the more strict, and the facts conferring jurisdiction must appear of record." *Id.* 19.

"A court of general jurisdiction may have special and summary powers, wholly derived from statute, not exercised according to the course of the common law, and which does not belong to it, as a court of general jurisdiction, and in such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. * * * The decided weight of authority supports the rule that judgments arising from the exercise of special powers conferred by statute are to be supported by no other presumptions, and regarded in the same light as judgments pronounced in courts not of record; the particular facts conferring jurisdiction must appear of record, and if such facts do not appear, the judgment will be treated as void." *Id.* 19, note 1.

The judgment rendered by a court must be such a one as it is authorized to render in the proceedings before it, or it will be *coram non judice*. *Id.* 133. So parts of a decree may be held void when the court exceeds its jurisdiction. *Munday* v. *Vail*, 34 N. J. Law, 418.

The last-named case holds that a decree in equity which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding. In that case the court used the following language:

"It is impossible to concede that because A. and B. are parties to a suit that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. If, in any ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince every

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one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but vital flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice."

See *Reynolds* v. *Stockton*, 43 N. J. Eq. 211 (10 Atl. 385, 3 Am. St. Rep. 305). To the same effect, see *Spoors* v. *Coen*, 44 Ohio. St. 497 (9 N. E. 132).

So we are constrained to hold that, notwithstanding the consent of Anderson, those portions of the decree above pointed out were void and of no effect for want of jurisdiction in the court to make the same. We cannot agree with counsel for appellees that those provisions of the decree alluded to can be sustained as "family settlements." There is nothing to show that the said provisions were intended to operate as "family settlements," and that fact is negatived by the will of Andrew Anderson, which appears in this record, showing that he made subsequent provisions for these children. Neither can a family settlement, such as is here claimed, be made in a divorce proceeding. What we have said here applies equally to the fifth clause of this decree, and to the provision for the benefit of Mrs. Gassman.

The decree of the court below will be modified in accordance with the views herein expressed, and otherwise affirmed. No costs will be awarded in this court to either party.

BIRD, C. J., and OSTRANDER, BROOKE, and BLAIR, JJ., concurred.

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SHEPARD v. SCHRUTT.

1. JUSTICES OF THE PEACE — TRANSCRIPTS OF JUDGMENT — ISSUANCE OF EXECUTION.
   No execution need issue in justice's court, under 1 Comp. Laws, § 845, to entitle a party to a transcript of judgment to the circuit court. *Peck* v. *Cavell*, 16 Mich. 10, distinguished.

2. SAME—AFFIDAVIT—AMOUNT DUE.
   The affidavit required by the statute to obtain a transcript is not sufficient alone, unless it states the amount due, and is promptly filed in the office of clerk of the circuit court, with the transcript, in which event no separate affidavit of the amount due (1 Comp. Laws, § 846) need be prepared.

3. SAME—TIME TO FILE AFFIDAVITS—PRACTICE.
   An affidavit filed in justice's court, made on January 13th, and filed with the transcript of judgment on January 15th in the circuit court, is sufficient, and the delay was not such as to give rise to the presumption of payment after the affidavit was made and before it was filed.

4. SAME—CLERK OF COURT—AFFIDAVIT.
   That the clerk of the circuit court did not take into consideration the amount due, stated in the affidavit, where he properly docketed the transcript and the amounts due, is not an objection to the validity of the transcript, since his act was ministerial and execution properly issued for the correct amount.

5. EXECUTION—LEVY—BILL IN AID OF EXECUTION—INDORSEMENT OF LEVY—SHERIFF.
   It was not error to permit the sheriff to indorse the levy of the execution on real estate of the defendant, by attaching to the execution at the hearing, a statement of his proceedings thereunder; the notice of levy recorded in the office of register of deeds is a sufficient compliance with the requirement of 8 Comp. Laws, § 10203.

6. SAME—TIME OF RECEIPT—INDORSEMENT BY SHERIFF—PROCESS.
   Oral testimony of the sheriff and an indorsement at the hearing, showing the time when he received the execution, sufficiently met the requirements of 8 Comp. Laws, § 10309, as to indorsement of the time of receipt.

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7. CREDITOR'S SUIT — BILL IN AID OF EXECUTION — FRAUDULENT CONVEYANCE.

Under evidence that a mortgage to one of the defendants was executed upon the property covered by execution, while action was pending between the complainant and his debtor, for the amount of the claim, that the money was paid over after judgment, and that defendants had stated that they had fixed matters so he could not collect his judgment, where they could not satisfactorily explain what became of the consideration of the transaction, sufficiently supports the determination of the trial court that the conveyance was fraudulent.

Appeal from Hillsdale; Chester, J. Submitted October 10, 1910. (Docket No. 25.) Decided December 7, 1910.

Bill by Charles A. Shepard against Henry U. Schrutt and Levi Schrutt, in aid of an execution. From a judgment for complainant, defendants appeal. Affirmed.

Powell & Chase and *Arthur L. Guernsey*, for complainant.

Merton Fitzpatrick and *Wilbur Grommon*, for defendants.

STONE, J. The bill of complaint in this cause was filed in aid of an execution. The complainant here had, as plaintiff, on January 6, 1908, recovered a judgment in justice's court against the defendant Henry U. Schrutt for $175.95 damages, and costs taxed at $5.60, making a total of $181.55. Later a transcript was taken to the circuit court, and an execution was issued and levied upon a lot known in this record as the "shed lot." On January 7, 1908, a mortgage was placed upon record on this property bearing date January 4, 1908, executed by defendants Henry Schrutt and Chloe Schrutt, his wife, to the defendant Levi Schrutt; the consideration named being $400. The case in the court below turned upon the validity of the transcript, the levy, and the mortgage; the complain-

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ant claiming that the mortgage should be set aside as in fraud of his execution levy. Decree was entered for the complainant, and the defendants have appealed.

The transcript proceedings are all in the record, and we will consider them in connection with the objections of the defendants. The claims of the defendants are:

(1) That the transcript was void because no execution was issued in justice's court before the transcript was applied for.

(2) That the provisions of section 846, 1 Comp. Laws, in regard to second affidavit were not complied with.

(3) That the judgment entered upon the transcript was void because the clerk did not take into consideration the affidavit of the amount due.

(4) That section 10309, 3 Comp. Laws, was not complied with in regard to the indorsement of time of receipt upon execution.

(5) *a* That the provisions in regard to the indorsement of levies upon executions were not complied with, and those provisions were mandatory.

(*b*) Not having complied with section 10203, 3 Comp. Laws, complainant could not make out a *prima facie* case.

(6) That these mistakes and omissions could not be cured by amendment.

(7) That the allegations in the bill of complaint (relating to indorsement of receipt and levy of execution) were jurisdictional, and the fact they were not proven entitled defendants to dismissal of the bill.

(8) That the court's findings, as filed, were not justified by the evidence introduced and the law as applicable to the facts proven.

1. Was the transcript void because no execution was issued in justice's court before the transcript was taken? In support of their contention counsel for defendants rely upon *Peck* v. *Cavell*, 16 Mich. 10. The statute in force when the above-cited case arose read:

"Whenever an execution shall be returned unsatisfied in whole or in part, it shall be the duty of the justice * * * on demand * * * to give a certified transcript." Comp. Laws, 1857, § 3786.

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This statute has been amended and now reads:

"Whenever an execution may by law be issued upon any judgment rendered by a justice of the peace for twenty dollars or over, exclusive of costs, the party in whose favor such judgment shall have been rendered * * * may make and deliver to the justice of the peace having control of such judgment, an affidavit, setting forth in substance that the deponent knows, or has good reason to believe, and does believe, that there are not sufficient goods and chattels liable to execution to satisfy such judgment, within the county in which said judgment was rendered, belonging to such person or persons against whom such execution may issue," etc., it then becomes the duty of the justice to make the transcript. Section 845, 1 Comp. Laws.

There is no longer any reason for the rule laid down in *Peck* v. *Cavell*, and the present statute does not make the issuance of an execution necessary, as a prerequisite of making the transcript. *Udell* v. *Kahn*, 31 Mich. 196; *O'Brien* v. *O'Brien*, 42 Mich. 15 (3 N. W. 233); *Vroman* v. *Thompson*, 42 Mich. 145 (3 N. W. 306).

2. Defendants urge that a second affidavit setting forth the amount due upon the judgment was not made. Section 845, 1 Comp. Laws, provides what affidavit must be made to entitle one to a transcript. Section 846, 1 Comp. Laws, provides what affidavit must be made to enable the clerk to file such transcript, and to enter and docket the judgment. The affidavit provided by the first-named section is not sufficient alone; but if that affidavit states the amount due, and is promptly filed with the transcript in the clerk's office, the amount due need not be stated in a separate affidavit. *Udell* v. *Kahn*, *supra*; *Smith* v. *Circuit Judge*, 46 Mich. 338 (9 N. W. 440). Here the affidavit of the amount due was made January 13, 1908, and was filed with the transcript in the county clerk's office January 15, 1908; that is, it was filed with the transcript the next day but one after it was made. In *Udell* v. *Kahn*, *supra*, the transcript was filed within three days after the affidavit was sworn to, and it was

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held to be timely, and that there was no such delay as might give rise to a presumption that payment after the date thereof, and before filing with the clerk, may have been made, as was the case in *Bigelow* v. *Booth*, 39 Mich. 622, where 8 days had elapsed, and in *Berkery* v. *Circuit Judge*, 82 Mich. 160 (46 N. W. 436), where 11 days intervened. So it must be held that the clerk had authority to receive, enter, and docket this transcript.

3. We do not think that there is any merit in the third objection, that, in entering and docketing the judgment and issuing the execution, the clerk did not take into consideration the affidavit of the amount due. No claim is made that the transcript was not properly docketed, nor that the amounts entered on the transcript docket in the circuit court, or for which the execution issued, are different than the affidavit of the amount due set forth, but that the clerk, as he testified, considered the transcript, or transcript docket entry, instead of the affidavit. The act of the clerk was a mere ministerial one, and an execution cannot be defeated nor declared void, if legally and properly issued, because of what the clerk may or may not have considered in issuing it. The proper affidavit was there; but whether it was considered by the clerk or not is not important.

The fourth, fifth, sixth, and seventh objections of defendants may be considered together. Upon this branch of the case we adopt the language of the circuit judge in a written opinion filed by him:

"Having found that the transcript is a legal and valid judgment in the circuit court, we pass to the questions raised on the execution and levy. February 18, 1908, the execution in question was issued. The sheriff did not indorse thereon the year, month, day, and hour when he received the same. The sheriff on February 25, 1908, executed and caused to be recorded in the office of the register of deeds a notice of levy on the lands in question in the form prescribed by statute; the notice stating that he had levied on the lands mentioned. The sheriff held the execution in his possession until the day of the trial of

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this case, and the same was offered in evidence without any indorsement of levy. Defendant objected to the execution being received in evidence because the time when it was received was not indorsed thereon; and, further, that it did not show that any levy had been made. Upon application of complainant, and against objection of defendant, the sheriff was permitted to attach to the execution what proceedings he took by virtue of the execution, and when, and the same was made a part of the execution. In *Vroman* v. *Thompson*, 51 Mich., at page 456 (16 N. W. 810), it was said:

"'That the officer must attest the intellectual act of levying by a written memorial of some kind, cannot be denied. So much is fairly implied. But it is not admitted that the visible evidence required can only exist in the form of an indorsement on the writ. The statute does not require it, and there is nothing in the nature of the thing demanding it. The object is to have some outward and permanent manifestation of the fact; something which is durable, intelligible, and public, in the nature of a record to which all may resort who are entitled to information and desire it. The necessity is for evidence which is plain and accessible, and this is well afforded by the recorded notice prescribed by the statute. We held in *Campau* v. *Barnard*, 25 Mich. 381, that this notice is primary evidence of the levy; and, when a levy is shown by primary evidence to exist, it is not perceived how it can be said not to exist. The supreme court of California have gone much farther than *Campau* v. *Barnard*. *Blood* v. *Light*, 38 Cal. 657 (99 Am. Dec. 441). No doubt it is the better practice to indorse the fact of levy on the execution when it is feasible to do so, but the levy cannot be regarded as imperfect for the want of it, where the proper notice is regularly recorded.'

"Also on page 459 the following language is used:

"'It has been shown that the facts were sufficient to constitute a levy on the 18th of September, 1876. Hence the subsequent indorsement of a levy, whenever made, is of no importance.'

"See, also, *Schoonover* v. *Osborne*, 111 Iowa, 140 (82 N. W. 505, 82 Am. St. Rep. 496). Under these authorities I think the indorsement of levy was properly permitted upon the trial.

"Section 10309, 3 Comp. Laws, provides:

"'Upon the receipt of any execution, it shall be the duty of the sheriff or other officer, to indorse thereon the year, month, day and hour of the day when he received the same.'

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"The sheriff did not comply with the provisions of this statute. The sheriff was called and gave oral testimony showing that he received the execution the same day the notice of levy was filed. Can this omission defeat this execution? My attention has not been called to any decision showing that this omission is a fatal defect or a jurisdictional defect. In *Hanson* v. *Barnes' Lessee* (3 Gill & J. [Md.] 359, 22 Am. Dec. 327), under a similar statute, it was held that the omission of such an indorsement would not invalidate the execution. True, the evidence in this case does not show the reasons given in that case to exist in this State. If other proof than an indorsement made at the time of the receipt of the execution is permissible to show when the execution was received by the sheriff, then that fact is established with reasonable certainty as to time (1) by the oral testimony of the sheriff, and (2) by the indorsement permitted to be made upon the trial of this case. I think this statute is not mandatory, and that this execution should not be declared a nullity by reason of the sheriff's failure to indorse thereon the year, month, day, and hour of the day when he received the same. It being found that this is a legal and valid transcript judgment in the circuit court, and that the execution is valid, and that the levy made in accordance with law, and such levy properly indorsed on the execution, and the conveyance being proved, it must be determined that complainant has established a *prima facie* case."

See, also, *Munson* v. *Ellis*, 58 Mich. 331 (25 N. W. 305).

Whether a technical case was made under section 10203, 3 Comp. Laws, by complainant upon the introduction of the documentary evidence, is not important here, for the reason that the complainant proceeded and offered testimony tending to show a fraudulent mortgage of the "shed property;" and in a chancery case we must consider the entire record of evidence. The meritorious question is whether upon the whole record the complainant should have the relief prayed for as to the "shed property" mortgage. It is a significant fact that the mortgage, even if executed at its date, which is questioned, was made by Henry U. Schrutt to his brother Levi while the suit was pending in justice's court which resulted in a judgment on

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January 6, 1908. The mortgage was left for record by the mortgagor on January 7, 1908. The defendants testify that it is their recollection that the money was paid over before judgment, and they fix the date by the fact that Levi had a certificate of deposit cashed at the bank. This certificate was canceled at the bank January 7, 1908, and it must be found that the money was not paid until that day. The record discloses that both Henry and Levi stated, in different conversations, that they had matters fixed so that Shepard could not collect his judgment. Their explanations of their dealings, and what was the real consideration for the mortgage, and what was done with the money, are far from satisfactory.

A careful examination of the entire testimony leads us to the conclusion that the evidence preponderates in favor of complainant, and that the circuit judge, who heard and saw the witnesses testify, reached a proper result in the case, and the decree below is affirmed, with costs to the complainant.

BIRD, C. J., and OSTRANDER, BROOKE, and BLAIR, JJ., concurred.

SCHWANZ *v.* WUJEK.

1. CONTRACTS—PARENT AND CHILD—SUPPORT OF PARENT.
   No liability attaches to a son for medical services and attention rendered to his father, except by express agreement or by virtue of 2 Comp. Laws, § 4487, providing for the maintenance of indigent persons by their children, as required by the directors of the poor, and providing for the method of procedure for determining their liability.

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2. SAME—QUESTION FOR JURY—EXPRESS CONTRACT.
But the case should have been submitted to the jury under plaintiff's evidence, disputed by defendant's testimony, that the son promised to pay for the services.

3. TRIAL — CONDUCT OF JUDGE — PREJUDICIAL INSTRUCTIONS TO JURY.
Remarks of the trial judge to the attorneys and expressions in the charge of the court showing bias or prejudice constitute reversible error.

Error to Wayne; Donovan, J. Submitted November 17, 1910. (Docket No. 24.) Decided December 7, 1910.

Assumpsit by Martin J. Schwanz against Casimir Wujek for medical services and attendance. Judgment for plaintiff. Defendant brings error. Reversed.

William Van Dyke, for appellant.

C. L. Bartlett, for appellee.

BROOKE, J. Plaintiff, a surgeon and owner of a private hospital, brought suit against defendant to recover for his services in operating on defendant's father, and for the care of the patient in his hospital for some 11 weeks. For the operation plaintiff claimed $400, and for the attendance $40 per week, or about $450. He recovered a judgment for $400.

Testimony was offered by the plaintiff tending to show that, when defendant brought his father to plaintiff's hospital, he agreed to become responsible for his father's care and operation. This was denied by defendant. Upon the question of the contract, the court charged the jury as follows:

"Now, gentlemen, to make a contract with the doctor is to be as unreasonable in a case of this kind, as it would be to make a contract with a railroad company to take you as far as you wanted to go. How can they make a contract, except with a man utterly unreliable? How can you make a contract with him, how much he would be willing to take to get through? A man who would make

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a contract in a case like this would be the worst kind of a judge. There could not be any contract, because they do not know how long the man will be ill, or how sick he would be, or how serious to take care of him. * * * I am perfectly willing you should consider the circumstances from beginning to end, how much would be a fair compensation, considering the sickness of the patient, the condition of the patient, and the care, and the length of time, and put it here to the plaintiff in one sum, because it is not like a promissory note, a sum fixed. They do not make a direct contract about it. It would be a sum such as the law fixes, a reasonable sum. For instance, the way you remember that homely illustration of boarding the horse; the same as caring for him, it would be just what a reasonable sum would be. The same as treating your wife; you are bound to pay for it. It would be just what that reasonable sum would be. The same as treating this man's father, from his home, where he should have been treated if at all. Where the father had placed the land, where he knew that the son was to care for him through the balance of his life, to let him down easily into the grave. That son could make the bargain, there is no doubt about it whatever. The law will imply if somebody took part of that burden, even if it was a hired man, that came in and cared for him one week, it would imply that the son would pay for it. It would imply he would pay for the hospital board. Anybody that relieved him of his obligation would be reasonably compensated."

We think that the only construction which the jury could place upon this language was that there was a common-law liability resting upon the son to reasonably provide for his father, that the contract followed as an implication of law, and that the only question to be determined by the jury was the amount which defendant should pay. We are unable to find any justification for this view of the son's obligation to his father. Undoubtedly there rested upon the son the moral obligation to care for his father so far as was consistent with his own means and station in life, but this was not a legal duty except as it became so by virtue of statutory enactment. Section 4487, 2 Comp. Laws, provides:

"The father, mother, and children, being of sufficient

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ability, of any poor person who is blind, old, lame, impotent or decrepit, so as to be unable to maintain himself, shall, at their own charge, relieve and maintain such poor person, in such manner as shall be approved by the directors of the poor of the township where such poor person may be."

Sections 4488–4492 provide the method of procedure for fixing and regulating the liability of the relatives.

It is clear the liability does not attach until the statutory proceedings have been had. *North* v. *Circuit Judge*, 59 Mich. 624 (26 N. W. 810), and cases there cited; *Clinton* v. *Laning*, 61 Mich. 355 (28 N. W. 125). The court should have instructed the jury that, in order for the plaintiff to recover, they must find from the evidence that the son had contracted to become liable for the operation upon, and the care and maintenance of, the father. Under such a charge, upon this record, there was testimony tending to show such a contract, and the jury might have so found.

Many errors are assigned upon remarks made by the court to counsel for defendant during the trial. To quote these remarks and examine them at length would serve no purpose of profit to the profession. It is sufficient to say that jurors are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge. This well-known fact should always, and it usually does, so impress itself upon the mind of the court that a manifest leaning towards one side or the other is impossible. We think that the attitude of the learned circuit judge, as indicated by his remarks to counsel for defendant and by his charge, was such as to clearly prejudice defendant's rights.

The judgment is reversed, and a new trial ordered.

BIRD, C. J., and MCALVAY, BLAIR, and STONE, JJ., concurred.

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HANSELMAN *v.* GRAND TRUNK WESTERN RAILWAY CO.

1. EASEMENTS—RAILROADS—RIGHT OF WAY—USE IN COMMON.
   An injunction will not be granted to complainant, the owner of a parcel along which a private right of way runs giving access to complainant's factory, to restrain a railroad company, having rights in common in the way with him, from constructing a siding for occasional use, upon a portion of the way, so long as no use is made thereof which unreasonably interferes with complainant's rights.

2. SAME—RAILROAD SIDING—DEEDS—USER.
   Under a deed by complainant to the railroad company conveying a right to use the way "to the fullest extent which the parties of the first part have the right to make use of the same, but without in any manner, or to any extent, diminishing the right of the first parties, etc., to make use of said right of way in common" with the grantee, the railroad company obtained a right to the use of the way for any of the purposes for which such a right of way might usually be used by a railroad company, subject to complainant's joint rights.

3. SAME—JOINT USER.
   What constitutes a reasonable use of the easement is a question of fact, and is a limitation upon defendant's right of user enforceable in complainant's behalf.

4. SAME.
   Since the location of the side track upon a particular portion of the easement would not of itself interfere with complainant's use of the way, he cannot compel defendant to locate the siding where he chooses to have it, although he may prevent unreasonable use of the track.

5. SAME—GRANT OF JOINT RIGHT TO EASEMENT—DAMAGES.
   By selling to defendant company the right to use the way, complainant waived any claim to statutory damages for the taking and use of the easement for railroad purposes.

6. RAILROADS—FRANCHISE—EASEMENT.
   Where the use of a right of way was derived by a railroad company by deed, conferring the joint right to use an easement on a portion of complainant's premises, its right de-

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pended on the conveyance, not on its franchise from the municipality to use streets and other ways, and the validity of the franchise and ordinance is not subject to complainant's objection.

Appeal from Kalamazoo; Knappen, J. Submitted October 17, 1910. (Docket No. 72.) Decided December 7, 1910.

Bill by George Hanselman against the Grand Trunk Western Railway Company, to restrain the construction of a siding. From a decree awarding a part of the relief prayed both parties appeal. Reversed and bill dismissed.

E. M. Irish, for complainant.

H. Geer, for defendant.

BLAIR, J. Complainant asks a permanent injunction against the defendant which will prohibit it from laying and operating a steam railway side track over the east one rod of lot No. 125 in Kalamazoo. Complainant is the owner of the westerly four rods of lot No. 125, which lies on the south side of East Main street. Lot No. 125 is five rods in width, and when the complainant purchased the west four rods of the same he was also, as a part of his purchase, deeded a right of way over the east one rod; the right of way clause being as follows:

"Also the right of way one rod in width on the easterly line of said lot 125, leading from said lot 302 northerly to Main street."

Lot 302 is owned by complainant and lies south of lot No. 125. The defendant now owns the fee in said east one rod; the complainant acquiring the right of way, and the defendant the fee, in this one rod through a common source of title. Before any controversy arose between the parties to this case, the complainant deeded some land

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immediately south of this one-rod strip to George W. Alexander, as trustee, as follows:

"Also granting hereby the right to make use of the right of way owned by the parties of the first part over and across the easterly one (1) rod of lot one hundred and twenty-five (125) of said plat, to the fullest extent which the parties of the first part have the right to make use of the same, but without in any manner or to any extent diminishing the right of the first parties, their heirs or assigns, to continue to make use of said right of way in common with the said party of the second part, his successors or assigns."

Complainant knew that Alexander was buying the land for railroad purposes, but was told by Mr. Hays, who conducted the bargain for Alexander, that the land east of this right of way would be used for a passenger station, and complainant knew nothing of any intention to lay tracks on the right of way. Defendant laid its main north and south line of railroad east of this right of way and now claims the right to lay a spur or side track, across the northeasterly end of this one rod of right of way for the purpose of getting to its freighthouse on the north side of Main street. The west four rods of lot No. 125, which is owned by the complainant, are completely covered by his factory, a three-story, brick building used for the manufacture of candy. He owns land to the south of this lot, which is also occupied by his plant, and his only way of getting in and out with his teams and the teams of his customers, and of getting to his stables in the rear, is over this right of way. It had been used as a passageway for teams daily for more than 20 years before the deed was made to Alexander. The side track which defendant proposes to lay would have its inside, or west, rail within six feet of the west line of the right of way; that is to say, within six feet of the east wall of complainant's factory—this, at the north end of the right of way, where complainant's teams enter from Main street. The average freight car would project two feet over the rail, bringing it within four feet of the brick wall, thus making it im-

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possible to get a team in and out when cars were on the track or approaching. The court below granted a decree that the defendant might lay its track on that part of the right of way which lies 12 feet east of complainant's east line, but not elsewhere. From this decree both parties appeal.

It is claimed on behalf of complainant that the defendant has no right to lay its tracks and operate its road in the streets of the city of Kalamazoo, for the reason that the franchise under which it claims is void for want of jurisdiction in the city council to pass it. It was not advertised as the charter provides. It is further claimed, in substance, that the clause in complainant's deed to Alexander constitutes a contract between the parties obligating defendant to make the same kind of use of the right of way that complainant was making of it and excluding the right to lay a track or operate cars over it, Complainant testified:

"*Q.* Will it be possible for you to carry on your business with this right of way blocked?

"*A.* No, sir. If there were no cars on the track this railroad of itself would not interfere with my getting in and out, if there was no obstruction nor cars on the track, and just the track itself."

We cannot concur in complainant's construction of the right of way clause in his deed to defendant. In our view, the legal effect of that clause was to authorize the defendant to use the right of way for any of the purposes for which a right of way over such a strip of land might usually be used by a railway company, so long as such use did not unreasonably limit complainant's common use thereof. As to what would constitute a reasonable use by the defendant would be for the most part a question of fact, and such use could be enforced by the courts. Under complainant's testimony, it is apparent that the location of defendant's side track upon any particular portion of the one-rod strip would not of itself interfere with his use of it, and he therefore cannot compel its location where he chooses to

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have it, but may protect himself against any unreasonable use of the track injuriously affecting his right of common use.

We do not consider the question of the validity of the ordinances or of the defendant's franchise to be of any importance, since defendant derived its authority to use the right of way from complainant and its right to cross Main street from its charter and required no franchise for that purpose.

We are also of the opinion that, when complainant sold the right of way to defendant, he waived his claims for statutory damages. 33 Cyc. p. 161, par. 3.

The decree is reversed, and the bill dismissed, with costs to defendant.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

BOYNTON *v.* KENT CIRCUIT JUDGE.

MANDAMUS—MOTION TO OPEN DEFAULT—ABUSE OF DISCRETION.

The denial of a motion to open the default of defendant, in an action of assumpsit, based on a consideration of the affidavits of plaintiff and defendant, and involving the determination of a question of fact, is an exercise of discretion not reviewable by mandamus for an alleged abuse of discretion.

Mandamus by Jeremiah W. Boynton to compel Willis B. Perkins, one of the judges of the circuit court for the county of Kent, to vacate an order denying a motion to open relator's default, and to vacate his default in an action at law. Preliminary writ allowed September 28,

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1910. Submitted October 18, 1910. (Calendar No. 24,270.) Writ denied December 7, 1910.

John W. Powers, for relator.

William E. Grove, for respondent.

HOOKER, J. The relator was defendant in an action upon a promissory note. His appearance was duly entered, and his default for not pleading was properly and seasonably entered. A motion to set aside the default based on his affidavit was denied, and this application is made for a mandamus to compel the circuit judge to vacate and set aside said order, and to make an order vacating the default.

The court heard this application upon affidavits. The plaintiff's affidavit was the usual formal one, throwing no light upon the questions of fact or law in dispute. Defendant's affidavit shows how the claim arose, etc., and none of these circumstances were denied. The court exercised his judgment in the matter, believing the plaintiff and disbelieving the defendant, as he expressly states. Where, as in this case, the action of the trial court is the exercise of honest judgment on a question of fact, he cannot be chargeable with abuse of discretion. The case is similar to *Carton* v. *Day*, 157 Mich. 43 (121 N. W. 295). The writ is denied.

MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

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BOYNTON *v.* KENT CIRCUIT JUDGE.

Mandamus by Jeremiah W. Boynton to compel Willis B. Perkins, one of the judges of the circuit court for the county of Kent, to vacate an order denying a motion to open relator's default and to vacate his default in an action at law. Preliminary writ allowed September 28, 1910. Submitted October 18, 1910. (Calendar No. 24,270.) Writ denied December 7, 1910.

John W. Powers, for relator.

William E. Grove, for respondent.

PER CURIAM. This cause is ruled by the case of *Boynton* v. *Kent Circuit Judge*, *ante*, 500.

In re GIBSON'S ESTATE.

APPEAL OF DAVIDSON.

ESTATES OF DECEDENTS—CLAIMS—CONTRACTS.

On the trial of a claim against the estate of a decedent for labor and services, it was proper to direct a verdict for defendant under testimony showing that claimant ceased to work for decedent more than six years before his death, that he had presented a claim against the deceased many years before, which had been compromised and paid, that deceased said to a person who appeared as a witness that he was going to give claimant his farm some day, but no evidence showed that the decedent agreed to pay claimant in money or property out of his estate, after his death, or that claimant performed any services after the alleged statements of deceased.

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Error to Oakland; Smith, J. Submitted October 24, 1910. (Docket No. 5.) Decided December 7, 1910.

William Davidson presented a claim against the estate of Jerome Gibson, deceased. It was disallowed by the commissioners on claims of said estate and claimant appealed to the circuit court. A judgment for defendant on a verdict directed by the court is reviewed by claimant on writ of error. Affirmed.

Andrew L. Moore, for appellant.

Patterson & Patterson, for appellee.

OSTRANDER, J. Claimant presented to commissioners on claims the following:

"The Estate of Jerome Gibson, deceased, to William Davidson, debtor, for work, labor and services from December 1, 1870, to December 1, 1905, including use of team, $2,000.00."

It was disallowed. On appeal to the circuit court, a verdict for the estate was returned by direction of the court. A motion for a new trial was denied. There was testimony tending to prove that claimant, at different times, from 1879 to 1896, performed services for decedent. How much he was to be paid does not appear. How much he was paid does not appear. It seems that after or during 1896 and for a year or two he worked decedent's farm on shares. In 1890 he presented a claim to decedent through an attorney and later stated to his attorney that he had settled the claim for $50 paid to him by Gibson on November 22, 1890. This testimony by the attorney is not disputed. There is no testimony tending to prove that Davidson and Gibson ever agreed that Davidson should perform services to be paid for in money or property after the death of Gibson. Such testimony as is relied upon by claimant is that of witnesses who undertake to recite statements made to them by decedent, some of the many years before the cause was tried, to the effect that when

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he died Davidson would get something out of his property, or would get a home, in payment for the good work he had done for him. One witness testified that decedent said to him that Davidson had been a pretty good fellow, and he guessed he would give him the farm.

"He said he told him [Davidson] he would give him the farm some day."

Witness fixes the date of this conversation as in 1898. Claimant's daughter testified to like statements made by decedent to her, and, also, that he said in the presence of her father there was no use of settling up things; he was going to will him when he died a home to pay for his labor. There is no testimony tending to prove that claimant ever performed any service for decedent after any of these statements were made.

We are of opinion that the court below properly declined to submit the case to a jury.

The judgment is affirmed.

BIRD, C. J., and HOOKER, MOORE, and STONE, JJ., concurred.

PEOPLE *v.* YUND.

1. ASSAULT AND BATTERY—RES GESTÆ—SUBSEQUENT OCCURRENCE.
   It was error, on cross-examination of complaining witness in a prosecution for assault and battery, to exclude questions relative to what occurred in continuation of the quarrel, without interruption, a short distance from the place of the first assault.

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2. CRIMINAL LAW — FORMER CONVICTION — CROSS-EXAMINATION — TRIAL.

In a prosecution for assault and battery, in which respondent took the stand, it was within the discretion of the circuit court to permit the prosecutor to cross-examine the respondent as to the details of a former conviction for another offense. BLAIR, J., dissenting.

3. SAME—CONDUCT OF PROSECUTOR—ARGUMENT.

While the prosecuting attorney improperly stated, in argument to the jury, that if they convicted respondent on appeal from a conviction in justice's court, they would do only what another jury had done, the misconduct was not reversible error, where the circuit judge corrected the effect of it at the time, and advised the jury that no weight should be given to the result in justice's court.

4. SAME—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT.

While it was error for the circuit judge to omit to instruct the jury as to reasonable doubt and the presumption of innocence, a just conviction will not be reversed for such omission which is not brought to the court's attention by exception or request to charge.

5. SAME—APPEAL AND ERROR.

The right of appeal is statutory, and review and reversal for an error not raised in accordance with the statutes and rules of practice, is not a right of a defendant, but may be discretionary with the court, although such discretion is seldom exercised.

Exceptions before sentence from Berrien; Coolidge, J. Submitted October 21, 1910. (Docket No. 146.) Decided December 7, 1910.

Philip Yund was convicted of assault and battery on appeal from a conviction in justice's court. Reversed.

John J. Sterling, for appellant.

William H. Andrews, Prosecuting Attorney, for the people.

HOOKER, J. The respondent was convicted of assault and battery in circuit court on appeal from a similar conviction in justice's court.

The evidence indicates that the parties (complainant

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and defendant) had an altercation over the pay for some bolts and timber, sold by complainant to defendant. It culminated in the alleged assault while they were going to the depot, after an agreement had been reached. The details of the affair need not be stated. The depot was but a short distance, *i. e.*, about 125 feet from the scene of the altercation, and respondent's counsel sought to show that complainant had continued the quarrel at the depot. One Monroe testified:

"I saw those two parties at the station on the 15th of April, 1909, about the time the fight occurred. I noticed that one side of Yund's face was somewhat bloody, and swollen and dirty. His collar was torn off. He took a clean collar from his grip and put it on in the depot. I saw Mr. Heffner there in the depot.

"*Q.* Was there any disturbance at the depot?

"*Mr. Andrews:* I object to it.

"*The Court:* The objection is sustained.

"*Mr. Sterling:* Note an exception.

"*Q.* Did Mr. Heffner in your presence call Mr. Yund a 'son of a bitch,' and say if he would come outside, 'I would lick him in less time than he could tell about it,' or something to that effect?

"*Mr. Andrews:* Objected to.

"*The Court:* The objection is sustained."

It was claimed that this tended to corroborate defendant's testimony that complainant was the aggressor. Similar questions were asked of the complaining witness on cross-examination, and the testimony was excluded on objection by the prosecutor. On defendant's cross-examination, the following occurred:

"*Q.* Have you ever been arrested before this?

"*A.* Yes, sir.

"*Q.* What were you charged with at that time?

"*A.* Libel.

"*Q.* Convicted?

"*A.* Yes, sir.

"*Q.* Fined?

"*A.* Yes, sir.

"*Q.* Paid your fine?

"*A.* Yes, sir.

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"*Q.* Libel is publishing that which you know to be false against somebody else, is it not?

"*Mr. Sterling:* I object to that.

"*The Court:* He is not called upon to define that.

"*Mr. Sterling:* I except to that question being propounded to the witness. It is done solely for prejudice; that is all.

"*Q.* In that case you were charged with publishing?

"*Mr. Sterling:* I object to the question before it is propounded.

"*The Court:* He has not finished.

"*Q.* You were charged with publishing a false statement against a neighbor of your township?

"*Mr. Sterling:* I object to the question.

"*The Court:* The objection is overruled.

"*Mr. Sterling:* They may show he was convicted of that offense and punished for it, but not to go into the details of it.

"*The Court:* He cannot go into the details. He was charged with committing a certain offense, and the prosecutor can state just what he was charged with. That is all he is attempting to do now.

"*Mr. Sterling:* The records will show for themselves. (Question read.)

"*Mr. Sterling:* I object to it; the records are here of this court, and that is the best evidence of what he was charged with.

"*The Court:* The objection is overruled.

"*Mr. Sterling:* Note an exception. (Question read.)

"*The Witness:* In what way do you want me to answer?

"*Mr. Andrews:* Answer any way you want to.

"*Mr. Sterling:* He has asked you what the charge was against you.

"*The Witness:* I published a statement, yes.

"*Q.* I say you were charged with publishing a false statement against that party?

"*A.* I said, 'Yes.'

"*Q.* And you were convicted of that charge?

"*A.* Yes, sir.

"*Q.* And the party was Philip Hyler of your township?

"*A.* Yes, sir."

In his argument to the jury the prosecuting attorney said:

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"If you say he is guilty, you will only be doing what another jury has done up at Watervliet, before this was appealed."

To which language and remarks counsel for respondent excepted.

"*The Court:* The jury should pay no attention to what is done below whatever—not the least in the world—what is tried before that jury.

"*Mr. Andrews:* The defense brought it in.

"*The Court:* It makes no difference if brought in by a dozen different witnesses. The jury try the case by the evidence here, and what was done in justice's court should have no influence whatever."

The charge of the trial judge was short and we give it in full:

"Gentlemen of the jury: I do not propose to say but a word or two with reference to this case. It is really a case for you and not for the court. There are no questions of law of great importance in this case; simply questions of fact for you to decide; an assault and battery case, and it is one of those cases for a jury to decide from the testimony in the case, and for the court to say very little. I will say a word or two. If the defendant in this case was the aggressor, made the first assualt upon the complaining witness, then of course he is liable. If the complaining witness first made an assualt upon the defendant, then of course the defendant is not liable for assault and battery, unless he used excessive force. It is claimed here by the prosecution that the defendant kicked the complaining witness. It is for you to decide, if it becomes necessary, whether the defendant used excessive force. That is, more force than was necessary to protect himself, or more force than a prudent man would use under those circumstances, under the excitement of the fight.

"At the request of defendant's counsel I also make another charge; if you find here that there was a mutual fight, which is called in law an affray, then the defendant would not be liable unless he used excessive force. That is, if two men go out to fight, if they are both willing to fight, if each invites the other, neither of them are liable for assault and battery unless excessive force was used. They are liable to the people, but not to each other. This is called an affray, where the

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two men get into a fight and both want to fight. They are liable both to be hauled up and punished for fighting. However, in the case of an affray if one uses excessive violence, goes entirely too far out of proportion to the affair, he is liable for assault and battery. Those are all the principles that apply to this case. You simply use your good sense. I have nothing to say about the merits of the case. The officer can be sworn."

No requests were offered, nor was an exception taken.

Counsel assign error upon the failure to instruct upon the subject of the presumption of innocence and reasonable doubt.

We think the conversation at the depot was a part of the *res gestæ*. It appears to have been a continuation of the quarrel, without interruption. The cross-examination of the complainant and the testimony of Monroe were admissible.

There was no error in the cross-examination of respondent, in relation to his conviction for libel. The matter was within the discretion of the circuit judge.

The argument of the prosecuting attorney was improper, but as it was a fact which must have been known, from the record, we should not reverse the case on that ground, especially in view of the remarks of the learned circuit judge in that connection.

Ordinarily a charge in a criminal case should contain instructions upon the subjects of the presumption of innocence and reasonable doubt. We should not reverse this cause for that omission; neither request nor exception being taken. It cannot be doubted that this omission was inadvertent, possibly in view of the fact that the jury had listened to instructions repeatedly in other cases; neither can it be doubted that had counsel suggested the subject or the omission, the judge would have given such instruction. A premium should not be placed on the practice in this case. Counsel owe it to the trial judge to be attentive to the charge and suggest corrections where respondent's rights are injured by it. Especially is this

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true where the rule is as well understood as in these particulars.

Again, while an exception need not be taken to misstatements of law in the charge, it is usually necessary where the fault consists of an omission. It is only fair to the public and to the trial judge, that exceptions be taken in both cases. The necessity has been abolished in the former case, but we cannot extend the rule. We do not overlook the alleged power of this court to consider the question, though no request was made nor exception taken, but it is only in cases clearly demanding it by reason of an apparent miscarriage of justice, that we will do so.

The right of appeal is statutory, and review and reversal for an error not raised in accordance with the statutes and rules of practice is not a right of a defendant, but may be within the discretion of this court, though it is seldom exercised. *People* v. *Maunausau*, 60 Mich. 15 (26 N. W. 797); *People* v. *Waller*, 70 Mich. 237 (38 N. W. 261); *People* v. *Ezzo*, 104 Mich. 341 (62 N. W. 407); *People* v. *Warner*, 104 Mich. 337 (62 N. W. 405); *People* v. *Willett*, 105 Mich. 110 (62 N. W. 1115); *People* v. *Considine*, 105 Mich. 149 (63 N. W. 196); *People* v. *Parsons*, 105 Mich. 177 (63 N. W. 69); *People* v. *Hinshaw*, 135 Mich. 378 (97 N. W. 758); *People* v. *Murphy*, 56 Mich. 546 (23 N. W. 215); *People* v. *Carter*, 96 Mich. 583 (56 N. W. 79); *People* v. *Carter*, 117 Mich. 576 (76 N. W. 90). The cases relied upon by respondent's counsel to sustain this contention were reviewed and distinguished by Chief Justice MORSE, in the case of *People* v. *Graney*, 91 Mich. 649 (52 N. W. 66), and this was followed in an opinion written by Mr. Justice GRANT, in *People* v. *Ostrander*, 110 Mich. 60 (67 N. W. 1079).

The judgment is reversed, and a new trial ordered.

MOORE, MCALVAY, and BROOKE, JJ., concurred with HOOKER, J.

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BLAIR, J. I think there was reversible error in permitting cross-examination as to the details of the libel, and I concur in reversal upon the ground stated in the opinion. As to the other questions, which will probably not arise upon another trial, I express no opinion.

PEOPLE v. GILBERT.

1. LARCENY—CRIMINAL LAW—VALUE.
   In a prosecution for larceny of a watch and chain, testimony of the owner that it was worth $42.50 to her, is incompetent to prove its market value.

2. SAME—EVIDENCE—SIMPLE LARCENY.
   Where other evidence was introduced to show that the stolen watch was worth $25, and no competent evidence appeared of record that the value was more than $25, respondent was erroneously convicted of a circuit court offense.

3. SAME—MARKET PRICE—EVIDENCE.
   By value is meant, not what the thing is worth to the owner, but the price that it would bring at the time and place of larceny in open market.

4. SAME—SENTENCE—JUSTICES OF THE PEACE.
   For a conviction at circuit of a crime within the jurisdiction of a justice of the peace, no greater punishment can be imposed than could be imposed by a justice (*People* v. *Harrington*, 75 Mich. 112 [42 N. W. 680]), and where respondent has already served seven months of a sentence, which, at its maximum, should be only three months, the respondent should be discharged.

Error to Ingham; Collingwood, J. Submitted October 21, 1910. (Docket No. 148.) Decided December 7, 1910.

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William Gilbert was convicted of larceny and brings error. Reversed, and prisoner discharged.

Jason E. Nichols, for appellant.

Walter S. Foster, Prosecuting Attorney, for the people.

MCALVAY, J. Respondent was prosecuted and convicted of stealing personal property of the value of over $25. He was sentenced to prison at Ionia for the period of not more than 5 years and not less than 2½ years. The court recommended that he should serve 5 years.

In bringing the case to this court for review, respondent raises but one question. He insists that under the proofs he should have been convicted of larceny of goods under the value of $25 and sentenced accordingly. All of the proof tending to show the value of the stolen property to be greater than $25 was based upon the inquiry as to what it was worth to the owner. The property consisted of a watch and chain, and the owner testified that she did not know its value, and only from hearsay knew what it cost several years before, when her daughter made a present of it to her. She testified that the property was worth to her $42.50; that she did not know the value of it. All of this testimony was subject to objection, and the court refused to strike it out.

The court was in error in receiving such evidence. The rule is well settled that the special value to the owner of property stolen is not the proper basis for proving its value. If the articles have a market value at the time and place of larceny, that is the true basis. 1 McClain on Criminal Law, par. 585.

"By value is meant, not what the thing is worth to the owner, but the price that it would bring in open market." 18 Am. & Eng. Enc. Law (2d Ed.), p. 467, citing *State* v. *Doepke*, 68 Mo. 208 (30 Am. Rep. 785).

There was evidence of the market value of this property. Eliminating the testimony objected to, there was

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no evidence in the case from which the jury could determine this property to be of greater value than $25, which must be found in order to convict of "grand" larceny. Counsel for respondent argues that his client should have been convicted of "simple" larceny and sentenced accordingly. We agree with this contention.

Such being our conclusion, we must consider the sentence imposed by the court. The offense proved against respondent, and for which he should have been convicted and sentenced, was larceny of property of less value than $25, and within the jurisdiction of a justice of the peace.

"It is the settled law of this State that for a conviction at the circuit of a crime within the jurisdiction of a justice, no greater punishment can be given than could be imposed by a justice." *People* v. *Harrington*, 75 Mich. 112 (42 N. W. 680).

The maximum term of imprisonment which a justice may impose is three months, and more than that time has expired since respondent was committed under the sentence of the court. In any view which may be taken of this case, he cannot be longer confined.

The judgment is therefore reversed, and respondent is ordered discharged.

HOOKER, MOORE, BROOKE, and BLAIR, JJ., concurred.

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PEOPLE *v.* LOWERIE.

1. CRIMINAL LAW—APPEAL AND ERROR—JURISDICTION—PLEA OF GUILTY.

   It is not a sufficient ground of objection to the jurisdiction of the court, that respondent was arrested for drunkenness on the street without a warrant, when he has submitted himself to the jurisdiction of the court by a plea of guilty.

2. SAME—DRUNKARDS—STATUTES.

   Evidence tending to show that respondent was intoxicated on the street of a village, that the sheriff followed and arrested him upon private property, warrants a conviction for drunkenness under 3 Comp. Laws, § 11736.

3. SAME—TRIAL—INSTRUCTIONS TO JURY.

   In the absence of a request for more ample instructions, the court's charge to the jury that the charge of being drunk signified such a condition as is induced from the excessive use of intoxicating liquors, and that the jury should determine the question from their common knowledge of its meaning, is sufficient.

Exceptions before sentence from Missaukee; Lamb, J. Submitted October 21, 1910. (Docket No. 147.) Decided December 7, 1910.

Abe Lowerie was convicted of being drunk upon a public street. Affirmed.

Gaffney & Miltner, for appellant.

Norman W. Dunan, Prosecuting Attorney, for the people.

MOORE, J. It is the claim of the people that in April, 1909, the sheriff of Missaukee county saw the respondent in a state of intoxication on the main street of the village of Lake City, and started toward him for the purpose of placing him under arrest; that before the arrest was made

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the respondent had passed from the highway upon a lot owned by a private citizen. The arrest was made without a warrant. The respondent was put in the county jail. Upon the following morning the sheriff made and swore to a complaint in writing, charging that the respondent—

"Was then and there drunk upon the streets of the village of Lake City, in said township of Reeder and county of Missaukee, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan; wherefore the said William H. Brown prays that the said Abe Lowerie may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require."

A warrant was issued and respondent was taken before the magistrate. We now quote from the brief of counsel for respondent:

"To which complaint and warrant respondent pleaded guilty and thereafter appealed to the circuit court of said county. There a trial was had before a jury. After the conclusion of the people's case, the respondent moved the court to direct a verdict of not guilty and discharge respondent from custody for two reasons:

"*First.* Because it appears from the testimony of the people that no violation of any law of this State was shown at the time of the arrest.

"*Second.* Because it appears from the testimony of the people that the arrest was made for a misdemeanor without a warrant and not during the actual commission of any offense."

This motion was overruled. No testimony was offered on the part of respondent and no requests to charge were made in his behalf. The case was submitted to the jury who found a verdict of guilty. The case is here upon exceptions before sentence.

We again quote from the brief:

"The respondent relies principally upon two assignments of error which will be discussed in the order beginning:

"*First.* The court erred in refusing to grant the mo-

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tion of respondent to direct a verdict of not guilty and discharge him from custody because of the illegal arrest without a warrant, while the respondent was on private property.

"*Second.* Because the court erred in stating to the jury that if they believed the respondent was drunk on Main street when the sheriff first saw him, that that would be sufficient for them to convict. The mere fact that he afterwards went upon private property would not change his condition.

"*Third.* Because the court did not give a proper charge to the jury of what constituted the crime of drunkenness."

First. Much space is used in the briefs in arguing the question of when an arrest can be made without a warrant. We deem it unnecessary to follow this discussion for the reason that when the respondent was taken before the magistrate he pleaded guilty to the complaint as contained in the warrant, thereby submitting himself to the jurisdiction of the court.

Second. What we have already said disposes of part of this proposition. The statute applicable to this case reads in part as follows:

"That any person who shall be drunk or intoxicated * * * in any street, alley, lane, highway * * * or other public place * * * shall, on conviction thereof before any court of competent jurisdiction, be punished, * * *" etc. 3 Comp. Laws, § 11736.

There was an abundance of testimony to justify a conviction for a violation of this statute.

Third. The court charged the jury in part as follows:

"The sole question for you here is, whether on that day the respondent was drunk and if so whether he was on the public street in the village of Lake City while he was drunk. Now, it is almost a begging of the question to attempt to define what we mean by 'drunk.' I shall only charge you in that regard that a charge of drunk signifies such a condition of a person as is induced from the excessive use of intoxicating liquors, and you have simply to say from all the testimony in this case whether or not the respondent was drunk; that is a common expression and

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everybody knows what condition a man is in, in order to be drunk, and you must determine that condition from the testimony so that the definition does not make it any plainer than the charge itself; however, it is for you to take into consideration all the facts and testimony and from that testimony determine, beyond a reasonable doubt, whether the respondent was on the 14th day April, last, drunk, and, if so, was he drunk on the public streets of Lake City."

In the absence of any request to amplify this charge, we think it sufficient.

The conviction is affirmed, and the case is remanded for further proceedings.

HOOKER, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

COWLEY v. MCGREGOR.

TAXATION—REDEMPTION—SPECIFIC PERFORMANCE OF ORAL PROMISE.

In consideration that a corporation should locate and construct a mill on certain property, complainant's father orally agreed to deed to the concern a lot owned by him. The mill was constructed, and a shop used in connection with the business was built on the lot, of which no deed was made by the owner to said corporation. Subsequently it purchased a tax interest for taxes of 1888 on the property and gave notice to complainant and other heirs of the father to redeem. On a bill against purchasers of the corporate business and assets to enforce the right of redemption, *held* that a decree should be entered for defendants, as prayed, dismissing the bill, since the court would, if all the persons in interest were before it, require the specific enforcement of the agreement to convey.

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Appeal from Alcona; Connine, J. Submitted October 18, 1910. (Docket No. 81.) Decided December 7, 1910.

Bill by Frank G. Cowley against John McGregor and William H. Gillespie, copartners as the Harrisville Milling Company, to redeem lands from a tax purchase. From a decree for complainant, defendants appeal. Reversed and bill dismissed.

Ward B. Connine, for complainant.

J. H. Cobb (*O. H. Smith*, of counsel), for defendants.

MOORE, J. Omitting the formal parts of the bill of complaint, it is averred that May 5, 1890, Bernard P. Cowley, the father of complainant, was the purchaser from the State for the taxes, assessed in the years 1880 to 1887 inclusive, and other years, on lot No. 13 of the Cowley and Roberts addition to the village of Harrisville. It further avers that the auditor general issued State tax deeds because of said purchase; that on the 20th of May, 1890, said deeds were duly recorded. The bill further avers that on May 26, 1904, the Harrisville Milling Company obtained a tax deed on said lands for the taxes of 1888.

"That on or about the 31st day of May, 1907, the said defendants caused to be served on your orator and upon Lillian C. Monroe Cowely, and upon Marie C. Schreiber Cowely, who are the legal heirs at law of the said Bernard P. Cowely, a notice of reconveyance, a copy of which is hereby annexed as Exhibit A and made part of this bill of complaint. That the said notice purports to be that required by Act No. 229 of the laws of Michigan for the year 1897, as amended. * * * That at the time of the said service of the said notice the last grantee in the regular chain of title to the said land was one Mary Ballentine. That her whereabouts could not be ascertained, and that due service upon her was made by publication. * * * That by reason of the aforesaid tax deeds executed and delivered to the said Bernard P. Cowley, and by reason of his subsequent death, and by reason of the fact that your

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orator is one of the heirs of the said Bernard P. Cowley, and by reason of the service of the said notice of reconveyance upon your orator, and by reason of the laws of this State applicable thereto, your orator became and is invested with the right and power to redeem said described lands from the tax titles so held by said defendants."

There are many other averments in the bill of complaint which it is not necessary to recite here, further than to say that the bill is filed for the purpose of allowing complainant to redeem. It is stated in the brief, and was stated by counsel on the oral argument, that it is sought to redeem only from the taxes of 1888. The defendants answered, denying nearly all of the material averments in the bill of complaint, and also filed an answer in the nature of a cross-bill in which are contained the following averments:

"These defendants, further answering said bill of complaint, claim the benefit of a cross-bill and set up the following facts in relation thereto: They say they obtained a tax deed for the taxes assessed against said lands for the year 1888, as readvertised and sold. That said tax deed is absolutely valid and gave them the absolute title to said land in connection with the proceeding therein taken by them. * * * These defendants further state in their said cross-bill, and charge the same to be true, that the Harrisville Roller Mill Company, a corporation under the laws of the State of Michigan, built a flour mill upon a portion of this land and the adjoining lot and occupied it for a number of years. That afterwards these defendants obtained the title of said flour mill to said property through a foreclosure proceeding of a mortgage given by said flour mill company to Mrs. Joseph Comstock, but no deed was given to the lot herein described. Defendants further answering said bill say there is a building on said lot known as a cooper shop. That since they obtained title to the mill property they have been in possession of said lot herein described, by occupying the cooper shop and piling wood upon the lot and using it in every way in connection with said mill. That said complainant has never been in peaceable possession of the lot. * * * Defendants further show under their cross-bill that said Bernard C. Cowley, in order to induce the Harrisville Roller Mill Company to locate its mill on its present site, agreed to deed the land herein described to said Harris-

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ville Roller Mill Company, and said agreement, as your orator states, on information and belief, was carried out, and any interest that said Bernard P. Cowley has in said property belongs to and is the property of the Harrisville Roller Mill Company. Defendants, further answering said bill of complaint, state that said complainant is attempting to use this court of chancery for the purpose of enjoining them from the peaceable possession and enjoyment of the property, the title of which is in them. And they herein and hereby pray that this court will decree that said complainant has no title whatever to said land, and that these defendants are the owners thereof under their said tax proceeding, and that they may have such other and further relief in the premises under their cross-bill as they are equitably entitled to and to this court seems meet, and defendants will ever pray."

A replication was filed to the cross-bill. A hearing was had and a decree granted, allowing complainant to redeem from the taxes of 1888. The case is brought here by appeal.

A great many interesting questions are presented, but in our view of the case it is not necessary to discuss them. It will be remembered that Bernard P. Cowley purchased from the State May 5, 1890. He died intestate, according to the testimony of complainant, October 19, 1900, leaving four heirs, one of which is the complainant.

The record shows that in the spring of 1890 a company was organized, known as the Harrisville Roller Mill Company. Upon the records of that company appears the following:

"First meeting of stockholders. Pursuant to call, the first meeting of the stockholders of the Harrisville Roller Mill Company was held at the office of George Rutson, in the village of Harrisville, on Wednesday, the 14th day of May, A. D. 1890. All stock subscribed was represented at this meeting, either by the stockholders in person or by proxy. On motion, Joseph Van Buskirk was elected chairman of the meeting and George Rutson secretary. The meeting then proceeded to the election of directors by ballot and the following persons, having received the greater number of votes, were declared duly elected, viz.: Joseph Van Buskirk, George W. Colwell, R. S. Lott, B.

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P. Cowley, D. W. Mitchell, Lew A. Colwell, George Rutson. The question of determining on a millsite was considered and discussed by the meeting, and, on vote of stockholders by ballot being taken, it was decided by such vote to accept the offer of Charles Martin and B. P. Cowley, of two lots on Lake street, in the village of Harrisville, one known as the Martin lot and the other as the Ballentine lot. Mr. Cowley offered to quitclaim the Ballentine lot and Charles Martin to convey by warranty deed for a consideration of $300 the said Martin lot."

It appears beyond question that the lot spoken of as the Ballentine lot is the lot involved in this controversy. The following also appears in the records of the Harrisville Roller Mill Company:

"At a special meeting of the Harrisville Roller Mill Company, held at the rooms over the post office, on Monday, June 15, 1891. Present, J. Van Buskirk, president; John W. Cowley, vice president; B. P. Cowley, treasurer; D. M. McGregor, secretary; James Anderson, Dr. D. W. Mitchell, Robert Reed, and Robert Dobson. The committee appointed June 1st. viz.: Joseph Van Buskirk, B. P. Cowley and George E. Colwell, reported: That an elevator was a necessity in connection with the mill; it could be built at the south end of the mill, and the size should be 32 by 34, to contain nine bins, to be built on a stone foundation, as the mill is now, the height to be the same as the mill, and the general work conform to the plan sent up by Noyes & Son of Buffalo. The cost would probably be about $2,000; also the engine room should have a fire wall across the entire end adjoining the mill to conform to the wishes of the insurance companies. Moved and seconded that each stockholder be assessed 20 per cent. of the original stock to provide sufficient funds for the improvements reported by the committee, and that the secretary notify each member to pay the assessment to the treasurer within 30 days, and that certificates of stock be issued to each stockholder for the assessment paid. Moved and seconded we now adjourn. D. M. McGregor, secretary."

While some of the details are lacking because of the lapse of time and death of many of the parties, it is convincingly shown by the record that following the first

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meeting of the stockholders, held May 14, 1890, there was erected on the millsite mentioned therein a large mill, and that following the special meeting of 1891 the elevator mentioned therein was erected. It is not clear as to what part of the mill or of the elevator was upon lot 13, but it is clear they were both on what was designated in the record of May 14, 1890, as a millsite. Later a cooper shop, used in connection with the mill, was erected on lot 13, and it was also used for piling large quantities of wood purchased during the winters to be used as fuel in the mill, all the year round, and also as a means of access to the mill over a roadway thereon. The record is also clear that lot 13 was used continually from the time of the erection of the mill in 1890 by the owners of the mill in connection with its operation, until shortly before the commencement of this suit, when complainant undertook to take possession. It does not appear that the father of complainant ever in fact made the quitclaim deed referred to, but it does appear that if he did not it would be his duty, upon request, if now living, to do so. See the many cases cited in the notes to section 9513, 3 Comp. Laws.

If Bernard P. Cowley was before the court, or if all his heirs at law were, we should not hesitate, upon this record, under the general prayer for relief in defendants' cross-bill, to make a decree settling the title in favor of defendants as against Bernard P. Cowley and his heirs at law, so far as said claim was based upon the tax purchase of Mr. Cowley, made May 14, 1890. The least we ought to do is to say that said tax purchase should not be allowed to be the basis of a decree which allows complainant, an heir at law of said Cowley, to create a cloud upon defendants' title, and which may subject them to further litigation.

The decree is reversed, and the bill of complaint is dismissed, with costs of both courts.

HOOKER, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

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RISKU v. IRON CLIFFS CO.

1. MASTER AND SERVANT—SAFE PLACE—SCAFFOLDING—MINES AND MINING.

   A miner, engaged in timbering a new shaft in a mine, in preparation for the ordinary operations of the business, may not recover for injuries sustained from the breaking of a staging or scaffolding on which he was at work, on the theory that the master owed him a duty to provide a safe place to work, since that doctrine does not apply while construction work is in progress.

2. SAME—FURNISHING PROPER MATERIALS—SCAFFOLDING.

   In furnishing plank to construct a platform on which the men so engaged could work, the employer owed a positive duty to furnish material of a kind reasonably fit for the purpose which it was intended to serve.

3. SAME—TIMBER—SAFE MATERIALS.

   If planks furnished were of a species of wood which, by its very nature, was unfit for such purpose, having reference to defendant's usual plan of construction, and plaintiff did not know of the unsuitability, he could recover for injuries caused by the breaking of defective material.

4. SAME.

   But if the timber was suitable in kind, and sufficient sound material was supplied for the purpose, defendant would not be liable for mistakes or negligence of its employés in selecting it, since they were fellow-servants with plaintiff.[1]

5. SAME.

   Held, that the evidence of incompetency of plaintiff's fellow-servants was insufficient to raise a question of fact.

Error to Marquette; Cooper, J., presiding. Submitted October 18, 1910. (Docket No. 78.) Decided December 7, 1910.

Case by Solomon Risku against the Iron Cliffs Com-

[1] As to duty of master to furnish safe appliances as affected by fact that defective appliances are prepared by fellow-servants, see note to *Haskell* v. *Cape Ann Anchor Works* (Mass.), 4 L. R. A. (N. S.) 220.

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pany for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

P. H. O'Brien (*C. F. Button*, of counsel), for appellant.

William P. Belden, for appellee.

BLAIR, J. Plaintiff brings this action to recover damages for personal injuries received in consequence of the giving way of a platform upon which he was working in one of the shafts in defendant's mine. The shaft had been excavated from the seventh level to the eighth level, and defendant's employés were engaged in timbering this new excavation, working upwards from the eighth level. The timbering was accomplished by placing sets of timbers one on top of another to form the sides and filling in behind these timbers with earth and rock to make the walls of the shaft solid. At about 12 feet from the bottom, and at intervals of 5 feet thereafter, it became necessary to build temporary platforms upon which the shovelers could stand. The material for filling was hoisted from the bottom in a bucket holding about half a ton, which was dumped, when about six inches above the platform, onto the platform. When the space behind the timbers was filled level with the platform, it was removed, additional timber sets put in, the platform put in place, and the work proceeded with as before. The shaft was divided into two compartments by dividing timbers across the middle of the shaft. The temporary platform was constructed by laying one hemlock plank 7 feet long, 8 to 12 inches wide, and 3 inches thick, at each side from the dividing timber to the wall timber, and upon these joists, as they are called in the record, three-inch hemlock planks were laid lengthwise so as to entirely cover the space in the shaft on the side where plaintiff was working. On the other side, a space was left through which the bucket was hoisted. The same planks were used in constructing

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the platform up to the time of the accident. The timbering, boarding of the platform, and filling the bucket were done by the miners who excavated the new part of the shaft. They were instructed how to build the platform by the timber boss:

"The planks that we did that with were lowered from the surface. They were all there at the time when he showed us. We built the stagings that way right along then. We built them out of the same planks right along. * * * When that staging was built, the first time it was built out of new fresh plank."

Mr. Carlson, the underground foreman, testified:

"I had charge of the work at these two shafts on the shift that I was working on. That is right. They did not have any underground foreman on the other shift opposite to me. I worked day shift all the time. The timber boss in the shaft where Risku was working, his name was Harry Ware, I think. As to who the other timber boss was, we had only one timberman. Timber boss was over both shafts. When they were timbering that shaft, he was staying there right along. He has full charge of timbering the shaft, full charge of that work. I think he generally used to select the timber. As to it being his duty to select the plank for the staging, well, I believe he did. * * * The next boss over me was Captain Stevens. * * * He was the captain of the mine. As captain of the mine he was to hire and discharge men. Yes, hired men. To work in the mine. He could tell the men where to go, and I had a right to tell them where to go too, on the day shift. And when Captain Stevens wasn't there I had full charge, I think so. * * * The timber boss was looking after the timber work in the mine. He had full charge of the timber work, and he was the one whose duty it was to lay out a plan for the timbering of the mine and to lay out a plan for building the stagings. When I went down there, I saw those stagings then that the men used to work on, when they filled in behind the timbers. I did pay attention to how they were built. I did pay attention to it, but I left that work to the timbermen mostly. Mr. Ware was our timberman. He was there at that time. And he would show these men that were working in the shaft how to put that timber together and how to build their staging. And they

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would build it after the plan that he would lay out. That is true; yes, sir. The men working as miners in the shaft, when they were laying those timbers, they were supposed to lay the timbers the way the timber boss directed them.

"*Q.* And they were supposed to build the staging the way the timber boss directed it to be built?

"*A.* When he was there. He told them how to build it, so they would follow his directions whether he was there or not; that is right. We always built the staging in that mine for working in the shaft in the same way.',

There was testimony tending to show that the men were ignorant of platform building and of the characteristics of timber. The men had been timbering the shaft for over a week and had got 30 or 40 feet from the bottom when plaintiff was sent by Mr. Carlson to shovel the rock and earth from the platform, which had been constructed before he began work upon it. After he had worked for a few hours, one of the joists broke, and he was precipitated to the bottom, receiving serious injuries.

"It was one of the joists that broke, closer to the other end, closer to one end than the other. The break was in on a bevel. In a bevel just a little bit. Not exactly across. It was a little bit beveled. A little bit slanting (like he holds his hand). The plank was crossgrained. The plank was soft wood. I don't know the name of it, how to call that wood. In Finnish we would call it hemlock."

There was testimony tending to show that hemlock was not a proper or safe wood to be used where only a single three-inch plank was used for joists, and that a platform constructed as this was constructed was not a safe platform for the purpose for which it was to be used. Defendant had judgment upon an instructed verdict, to review which plaintiff prosecutes this writ of error.

As stated in the brief for appellant, the questions involved may properly be divided into five main subjects: (1) Safe place, involving fellow-servant question; (2) improper plan of construction of the staging; (3) failure to supply suitable material; (4) incompetent fellow-servants to build the stagings; (5) assumption of the risk.

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1. The men constructing the new shaft, whether in excavating or timbering it, were engaged in preparing a place in which the ordinary operations of the mine would be carried on and the use of the platform, or staging, was a mere incident to the construction of such shaft. While the shaft was in process of construction, the doctrine of safe place would not apply; after it was constructed, it would apply. *Landowski* v. *Chapoton*, 137 Mich. 429 (100 N. W. 564), and cases cited.

2, 3. We consider 2 and 3 together. In furnishing plank for the platform, the defendant owed to the employés the positive duty of furnishing material of a kind reasonably fit for the purpose for which it was to be used. *Hoar* v. *Merritt*, 62 Mich. 386 (29 N. W. 15); *Brown* v. *Gilchrist*, 80 Mich. 56 (45 N. W. 82, 20 Am. St. Rep. 496); *Carnell* v. *Halpin*, 159 Mich. 42 (123 N. W. 578); *Lafayette Bridge Co.* v. *Olsen*, 108 Fed. 335, 47 C. C. A. 367 (54 L. R. A. 33). If the planks furnished were of a species of wood which by its very nature was unfit for the purpose for which it was used, having reference to defendant's usual plan of construction, of which unfitness plaintiff was unaware, he was entitled to recover. If, however, the timber furnished was of a suitable species, and sufficient sound planks were furnished, the defendant would not be liable for mistakes or negligence in selection, since the employés making such selection would be fellow-servants of the plaintiff. *Beesley* v. *Wheeler & Co.*, 103 Mich. 196 (61 N. W. 658, 27 L. R. A. 266).

4. We do not find sufficient evidence of the incompetency of the men constructing the platform to warrant the submission of the question to the jury.

The judgment is reversed, and a new trial granted.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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STANSELL *v.* AMERICAN RADIATOR CO.

1. EASEMENTS—QUIETING TITLE—TAXATION—TRUSTS.

   Complainant was the purchaser of a tax interest in a thirty-foot strip of land, over which defendant had an easement. The Murphy Chair Company furnished the consideration of the tax purchase and took the conveyance in complainant's name, for its benefit, but without any trust instrument evidencing the nature of the transaction. The title to the thirty-foot strip was held in the name of the secretary and treasurer of the chair company, subject to defendant's easement and to an easement of a third party which owned adjoining premises. Defendant's rights had been recognized by a formal deed of the chair company to defendant in connection with a separate transaction. The Murphy Chair Company held in its own right an easement over the thirty-foot strip, which connected its premises with a public street, and with a railroad right of way. The purpose of complainant's tax purchase was admitted to be that the rights of easement over the premises might be cut off. *Held*, that a suit of complainant to quiet title to the premises would be treated in equity as the suit of the Murphy Chair Company; that the statute prohibiting resulting trusts (3 Comp. Laws, § 8835), was not intended to legalize such a proceeding in fraud of rights of the defendant, and that the easement was appurtenant to property of the chair company,—not an easement in gross.

2. SAME—TAXATION—APPURTENANCE.

   Easements not in gross are assessable to the owner of land to which they are appurtenant. 1 Comp. Laws, §§ 3825, 3850.

3. SAME—DEEDS—CONTRACTS.

   Where a deed contains a provision that the grantee confirms and recognizes an easement described in the conveyance, it is as binding as would be a separate grant of the right of way by the one who accepts the instrument.

4. SAME—TAXATION—DUTY TO PAY TAXES.

   And the owner of the estate to which the easement was appurtenant, owed to the defendant a duty to pay taxes assessed thereon, which duty it discharged by purchasing the tax interest in the complainant's name; nor did it acquire any additional rights by such action.

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Appeal from Wayne; Murfin, J. Submitted October 19, 1910. (Docket No. 20.) Decided December 7, 1910.

Bill to quiet title by Arthur D. Stansell against the American Radiator Company. From a decree dismissing complainant's bill, he appeals. Affirmed.

Orla B. Taylor and *Charles F. Delbridge*, for complainant.

Bernard B. Selling (*Charles H. Ripley*, of counsel), for defendant.

BLAIR, J. On April 11, 1885, M. J. Murphy & Company, the predecessor of the Murphy Chair Company, purchased certain land in Detroit and a right of way over a 30-foot strip furnishing an outlet to Russell street. Subsequently, this property and easement were acquired by the Murphy Chair Company. Briggs and Sill, the originators of the American Can Company, on July 27, 1899, purchased land abutting on the 30-foot strip and on Russell street and Trombley avenue, with an easement for a railway track across the 30-foot strip. On December 21, 1899, Murphy, Wasey & Company purchased the parcel east of the land of the American Can Company, and the Murphy Chair Company is the present owner thereof. On June 22, 1899, the defendant purchased certain land east of the last-mentioned parcel of the Murphy Chair Company; the deed conveying an easement for a railway track across said 30-foot strip. On December 9, 1899, the owner of the fee of the 30-foot strip deeded the same to James F. Murphy, trustee, subject to all easements, including defendant's. This purchase was made with the money of the Murphy Chair Company, of which James F. Murphy was the treasurer and one of the three directors. On May 16, 1901, the American Radiator Company and the Murphy Chair Company delivered deeds *inter se*, each releasing the land of the other from certain

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other easements relative to tracks to the Detroit, Grand Haven & Milwaukee Railway, but in no way affecting the easement here involved. The deed from the radiator company to the Murphy Chair Company contained the following recital relative to the easement in question:

"The right of way or easement pertaining or belonging to the last-mentioned piece or parcel of land described in a certain deed made by Henry B. Lothrop, as executor of the last will and testament of George V. N. Lothrop, deceased, and others, to the American Radiator Company, dated June 22, 1899, and recorded in the office of the register of deeds in and for said county, in vol. 511 of Deeds, page 407, as the right to construct and maintain a railroad track across the southerly part of the remainder of said premises (being the same premises referred to in said conveyance as contracted to Force & Dickinson, a part of which is now owned by said Murphy, Wasey & Company) and across or along the thirty (30) foot strip mentioned in said contract substantially upon the line of said track as at present constructed, is not released or conveyed, but is recognized and confirmed by the parties hereto."

The taxes not having been paid for the years 1900, 1901, and 1902, the 30-foot strip was sold therefor to one Wiltsie of Rochester, N. Y. On January 6, 1904, the Murphy Chair Company paid to Mr. Wiltsie the amount that he demanded for the certificates of purchase for the taxes of 1900, 1901, and 1902, and had such certificates assigned to one Thomas Fairgreave, an employé in the office of the Murphy Chair Company. Mr. Fairgreave never was informed of this transaction and he never saw the certificates until the trial of the case at bar.

Mr. Fairgreave testified:

"The first time I ever saw these certificates was in this courtroom.

"*Q.* Did you know that these certificates were assigned to you by Mr. Wiltsie prior to yesterday?

"*A.* No; I cannot say that I understood.

"*Q.* The first you ever knew you were the owner of any tax certificates on property out by the plant of the Murphy Chair Company was yesterday. Is that right?

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"*A.* I cannot say that I have understood the deal at all. I knew a little about it several years ago when I got a letter from Mr. Wiltsie which I turned over to Mr. James Murphy. I don't recall the year. I don't remember anything about it. I had a vague idea of the business at that time. I simply turned the letter over to Mr. Murphy and had nothing further to do with it. I do not claim any interest in these certificates. At the time I was assistant to Mr. James F. Murphy."

Michael J. Murphy, president of the Murphy Chair Company, testified as to these tax certificates:

"*Q.* I just want to refer to that letter which you wrote to Mr. Wiltsie which was introduced in evidence the other day, Exhibit 5, in which you make this statement, 'Some time ago we obtained from you a similar assignment in the name of Thomas Fairgreave and the property has since stood for assessment purposes in his name. We took an assignment of his title too. Mr. Fairgreave is an employé of ours.' Will you state whether you were in error in making that statement in the letter.

"*A.* Yes, I was in error. I thought that we had taken an assignment. I find that we have not, and under the belief that we had taken an assignment, I claimed that we owned it. * * * I find that we have had the tax certificates in our possession all the time since they came from Mr. Wiltsie. They have never been out of our possession. I have noticed that no tax deed against this property may issue without the surrender of the certificates, so that without the consent of the Murphy Chair Company, there was no way of Mr. Fairgreave getting title."

The 30-foot strip was also sold for the city taxes, for the year 1903, and was bought in by Wiltsie, and a certificate of tax sale was issued to him. This purchase was not made at the request of James F. Murphy or the Murphy Chair Company. On July 7, 1906, the Murphy Chair Company sent its check to Wiltsie for the amount of the tax and charges and received the certificate of tax sale assigned in blank. On August 21, 1906, this blank certificate, filled in with the name of Arthur D. Stansell, an associate of Orla B. Taylor, counsel for the Murphy

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Chair Company, and James F. Murphy, was surrendered to the city controller and a tax lease for 99 years was issued to and in the name of Mr. Stansell.

Mr. Stansell testified:

"The certificate was in blank when I got it. I put it in my own name at your direction. I then had the deed, Exhibit 3, made out in pursuance of that certificate. At the time I received the deed, I did not make any written or oral declaration of trust in anybody's favor. I have not been directed by any one to transfer it to any one else. If you were to ask me to transfer the property, I would transfer it as requested. I have never been in possession of the land. I don't think I have ever seen it. * * * I have heard Mr. Murphy's testimony this moning, that he got the certificate for the tax list for the year 1903, but it was my recollection that I got that directly from Mr. Wiltsie himself by writing him for it. I may be mistaken."

Neither Mr. James H. Murphy, Mr. Fairgreave, nor Mr. Stansell ever took possession of this strip, but it was used by the Murphy Chair Company as its own.

Mr. Michael J. Murphy testified:

"The title to that property was taken in the name of James F. Murphy, trustee, for the purpose of preventing a merger of our rights of easement over that, and a merger to the title of the two pieces of property, so as to protect our rights, whether of easement or as squatters. * * *

"*Q.* So that, from the original purchase of that property, when the title was taken in the name of James F. Murphy, trustee, you have pursued a consistent practice of keeping the record title of that property in the names of other parties besides the company?

"*A.* Yes, sir. I do not think Mr. Stansell has ever taken possession of this land. I would know, am up there every day. Neither the Murphy Chair Company nor James F. Murphy, trustee, has any agreement in writing with Mr. Stansell to convey the property to either one of them. * * * I suppose Mr. Stansell got the tax certificates in which he put his name in the blanks, 1740, from us. Mr. Taylor was attending to our business and we handed it to him to treat in any way that he thought

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right to protect our interest. I would have to go back to tell you when I first had the idea that it would be possible to cut off the American Radiator Company's rights by obtaining an adverse title through a tax deed or otherwise. Mr. James F. Murphy bought that 30-foot strip. The purchase was attended to by Mr. Davock, who was acting as our attorney. Some years after that we discovered that the property had been sold for taxes and that it had been purchased by Mr. Wiltsie, and it occurred to me that it was just possible that our right of easement over that property might be lost, so that I purchased the title from Mr. Wiltsie, in order to protect our right of easement, and had the title put in the name of Thomas Fairgreave. At that time I reasoned if it was necessary for me to buy tax titles to protect my own easement, that certainly it would be necessary for everybody else to do the same thing to protect their interests. * * *

"*Q.* Now this suit was begun by Mr. Stansell for the benefit of the Murphy Chair Company, was it not?

"*A.* Yes, sir.

"*Q.* There is no question about that. Mr. Stansell has no interest whatsoever in this piece of property of any kind, has he, except as your representative?

"*A.* He has the title to it. We could not sell it. I do not suppose you would buy it of us.

"*Q.* He holds the legal title for you, doesn't he?

"*A.* He holds the legal title. If there is no object in protecting any one's interest, I do not know whether we will ever ask him to return it to us. Since this suit was started, the Murphy Chair Company fenced in a part of this property because we are improving the appearance of things down there and we put out a lot of grass and some shrubs, and we wanted to protect the shrubs from being pulled up. * * *

"*Q.* You knew in 1902 there was sufficient question about it, that you did not want Wiltsie to have any tax titles against that property, didn't you?

"*A.* We wanted to know who owned the tax titles, certainly. We didn't want them outstanding in anybody we didn't control in 1902. * * * It wasn't our property really; that is, I mean legally. We had possession of it for a good many years—used it.

"*Q.* James F. Murphy simply held the legal title as trustee for the Murphy Chair Company; that is correct?

"*A.* Yes. The Murphy Chair Company had furnished

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the money for the purchase of all these tax titles in the name of Fairgreave for 1900, 1901, and 1902. The State and county taxes were paid by Murphy Chair Company money. So far as this particular piece of property is concerned, James F. Murphy, as an individual, never at any time put one dollar into the proposition, either in the way of purchase price or payment of taxes, or anything else. He always owned it as trustee."

July 7, 1906, President Murphy wrote the following letter:

"Mr. CHARLES H. WILTSIE,
"320 Powers' Bldg.,
"Rochester, N. Y.

"*Dear Sir:*

"We have received your notice to Thomas Fairgreave, with relation to the thirty (30) feet on Russell street, adjoining the Wabash Railway, for which you request him to send you $33.93 for the assignment of your claim upon this property for the taxes of 1903, under which the property was sold. This property really belongs to the Murphy Chair Company and our desire is to obtain in our own name the ninety-nine-year lease to which we are entitled. We wish you would take this lease from the city and assign the same to us. If there are any additional fees for it then we will pay them to you. Some time ago we obtained from you a similar assignment in the name of Thomas Fairgreave and the property has since stood for assessment purposes in his name. We took an assignment of his title to it also. Thomas Fairgreave is an employé of ours and has been for a great many years, and the transaction has gone on under his name for reasons which, probably, will be apparent to you. We are enclosing check for $33.93 to pay taxes, interest and your charges.

"Yours very truly,
"MURPHY CHAIR COMPANY.
[Signed] "M. J. MURPHY, President."

George V. N. Lothrop was the original owner of all of the lands involved.

On November 9, 1907, the bill of complaint was filed in this case to remove the cloud from the title to the 30-foot strip created by the easement of the American Radiator

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Company, upon the theory that it was wiped out by the sale and 99-year lease from the city to complainant. On June 17, 1908, the defendant filed its answer, basing its defense substantially upon the proposition that complainant acquired no rights from the tax sale, certificate, and lease, that in law he was acting for the legal holder of the title of said premises, James F. Murphy, trustee, or his *cestui que trust*, and that the acquiring of said tax certificate by the complainant was in fact and in law the payment of taxes by the person or persons legally bound to pay said taxes. On December 18, 1909, upon the completion of the hearing of the case, Judge Murfin dismissed the bill of complaint. The case is here on appeal from this decree.

The issues involved, as stated by counsel for complainant, are:

"(1) Is the position of complainant so independent of that of the other parties in interest that he has a full and complete right of possession of the property, divested of all easements, by reason of his tax lease for 99 years?

"(2) If it be conceded that complainant, the Murphy Chair Company, and James F. Murphy, trustee, are in exactly the same interest, are their relations, or the relations of any of them, to the property or to the defendant, such that it was their duty to pay the taxes upon the 30-foot-strip, and that they could not, by acquiring the tax lease, cut off the easement of the defendant for the term of the lease?"

It is perfectly apparent, as stated by the president of the Murphy Chair Company in his letter, that "this property really belongs to the Murphy Chair Company;" that this suit is instituted by the nominal complainant "for the benefit of the Murphy Chair Company;" that James F. Murphy holds the property for the Murphy Chair Company and not adversely to it and will turn the property over to it in recognition of his moral obligation whenever requested to do so; that the complainant, if successful in this suit, will convey the property discharged of all easements to the Murphy Chair Company; and that the primary object of

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these roundabout proceedings is to cut off the easement, for the benefit of the Murphy Chair Company. The statute against resulting trusts, 3 Comp. Laws, § 8835 *et seq.*, was never intended to legalize such proceedings for the benefit of the grantor and in fraud of the rights of others, and we shall treat this suit as the suit of the Murphy Chair Company, and the property as the property of the Murphy Chair Company.

Were the taxes on the 30-foot strip legally assessable against the Murphy Chair Company solely, or should they have been divided and the value of the easements assessed against the holders thereof?

Section 3825, 1 Comp. Laws, provides:

"For the purpose of taxation, real property shall include all lands within the State, and all buildings and fixtures thereon, and appurtenances thereto, except such as are expressly exempted by law."

Section 3850 provides:

"The words 'cash value,' whenever used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. In determining the value the assessor shall also consider the advantages and disadvantages of location, quality of soil, quantity and value of standing timber, water power and privileges, mines, minerals, quarries or other valuable deposits known to be available therein and their value."

While the easement under consideration was not absolutely essential to the enjoyment of the dominant estate, one of its termini was upon that estate, and it was granted to, and to be used and enjoyed by, the defendant, "its successors and assigns," and the easements were recognized by the parties in their deeds relative thereto as appurtenances "which appertain and belong to the following described piece or parcel of land," etc. These easements do not fall within any definition of easements in gross. They were granted or reserved by the original

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owner of all of the lands, or his representatives, through whom all of the parties derive their titles, for the benefit of the lands and not as mere personal privileges. They were intended to be appurtenant and not in gross, and as appurtenances were assessable to the dominant estate under the statute above quoted. It has never been the custom in this State to assess such interests separate from the dominant estate, and it is more logical to assess them in connection therewith. *Winston* v. *Johnson*, 42 Minn. 398 (45 N. W. 958); *City of Fall River* v. *County Com'rs*, 125 Mass. 567; *City of Detroit* v. *Railway Co.*, 76 Mich. 421 (43 N. W. 447); *Lever* v. *Grant*, 139 Mich. 273 (102 N. W. 848, 103 N. W. 843); *D. M. Goodwillie Co.* v. *Electric Co.*, 241 Ill. 42 (89 N. E. 272).

The deed of the defendant to the Murphy Chair Company of May 16, 1901, was as much a binding agreement as to its right to enjoy the easement as though the chair company had executed a deed confirming or granting the right of way to the defendant. *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35 (13 Am. Rep. 556); *Hagerty* v. *Lee*, 54 N. J. Law, 580 (25 Atl. 319, 20 L. R. A. 631); *D. M. Goodwillie Co.* v. *Electric Co.*, *supra*.

The original conveyance of the right of way to defendant was as follows:

"* * * together with the right to construct and maintain a railroad track across the southerly part of the remainder of said premises and across or along the 30-foot strip mentioned in said contract substantially upon the line of said track as at present constructed, and also the right to use and enjoy the said easement reserved in and by the deed and conveyance to said Huyett above mentioned; such rights of way and easements, however, to be used and enjoyed by the said third party, its successors and assigns, in common with the owners and occupants of the remainder of the premises described and mentioned in said contract of sale."

Under the law, it was the sole duty of the chair company to pay the taxes on the servient estate; under its contract confirming the right of defendant to construct

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and maintain the track and use and enjoy the easement in the future, it owed the duty to the defendant to pay the taxes, and its acquisition of the title through the transfer of the tax-sale certificates to its attorneys was, as to defendant, a mere discharge of its duty, which gave it no new rights as to him. *Dubois* v. *Campau*, 24 Mich. 360; *Sleight* v. *Roe*, 125 Mich. 585 (85 N. W. 10); *Dahlem* v. *Abbott*, 146 Mich. 605 (110 N. W. 47); *Simons* v. *Rood*, 129 Mich. 345 (88 N. W. 879).

The decree of the circuit court was right and is affirmed, with costs to defendant.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

HOSKING *v.* CLEVELAND IRON MINING CO.

1. MASTER AND SERVANT—MINES AND MINING—NEGLIGENCE.
   While a miner working at blasting and timbering up a portion of the mine that is in process of construction, may not recover for injuries caused by a fall of ore, resulting from an unusual delay in supporting the roof, on the theory that his master owed a duty to furnish a safe place (*Petaja* v. *Mining Co.*, 106 Mich. 463 [64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505]), he is entitled to such warning and instruction concerning the augmented risk which arises from such a delay, as his inexperience and want of knowledge may, in the exercise of due care, require of the employer.[1]

2. SAME—TRIAL.
   And defendant is not chargeable with actionable negligence for failing promptly to provide an assistant so that plaintiff might proceed at once to support the earth.

[1] As to master's duty to warn or instruct servant, see note to *James* v. *Rapides Lumber Co.* (La.), 44 L. R. A. 33.

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3. SAME.

No negligence is chargeable to defendant for failing to adopt safe methods of work, and see that they were carried out, so as not to subject plaintiff to hazards that were not within his contract of employment.

4. SAME—INSTRUCTING SERVANT—PERSONAL INJURIES.

Where plaintiff was inexperienced in the kind of work which he was doing, had only worked for defendant about six weeks, and testified that he did not know the danger of a fall of earth would increase by reason of a delay in timbering the raise, such as occurred before his injury, it was error to direct a verdict for defendant, although plaintiff knew that small quantities of ore were likely to fall at any time.

5. SAME—ASSUMED RISK—WARNING—QUESTION OF FACT.

If plaintiff possessed actual knowledge of the increased risk, or if, in the exercise of ordinary prudence, he should have possessed it, he assumed the risk of his injury.

6. SAME.

The jury should have been instructed to determine, under the testimony: (1) whether or not the delay in timbering increased the danger; (2) whether or not plaintiff knew, or, in the exercise of ordinary prudence, should have known, of the increased danger; (3) whether or not, considering his experience and knowledge, defendant owed him the duty to warn him of the increased danger, if it existed.

Error to Marquette; Cooper, J. Submitted October 18, 1910. (Docket No. 65.) Decided December 7, 1910.

Case by Samuel Hosking against the Cleveland Iron Mining Company for personal injuries. A judgment for defendant on verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

P. H. O'Brien (*C. F. Button*, of counsel), for appellant.

William P. Belden, for appellee.

Plaintiff, who had theretofore had no experience in iron mining, went to work for the defendant company on February 27, 1905. He worked as a stemmer or assistant for

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three weeks in various parts of the mine, after which he was given employment as a regular miner. On April 14, 1905, he was injured through the fall of a large quantity of ore from the roof of a raise which was in process of construction. It appears from the record that a blast had been exploded on the evening of the 13th, in the raise in which plaintiff and his partner were engaged. In the ordinary course the space caused by this blast should have been timbered the first thing on the morning of the 14th. Upon arrival at the mine, however, plaintiff found that his partner had not come. Instead of supplying him with a stemmer to assist him in timbering the raise in contract 34 (his own contract), plaintiff was directed by Samuel Metherell, the shift boss, to go into contract 43 and work with one Emil. At noon he was instructed by the same official to go back to his own contract (34) after dinner, and timber it with Emil's assistance. Some five or six hours had elapsed between the hour in the morning when, according to the rules of the defendant company, this work should have been done, and the time when it was actually commenced. When plaintiff and his partner, Emil, arrived at the raise (contract 34), they found the roof squared up ready for the timber. It appeared safe. They had erected the uprights and caps, and had nearly completed the placing of the lagging or overhead protecting timbers, when a large quantity of ore fell from the roof, striking plaintiff and so severely injuring him that one of his legs was amputated a few weeks later.

Plaintiff alleges that the defendant was negligent in the following particulars:

"(*a*) The failure to furnish the plaintiff with a reasonably safe place in which to work.

"(*b*) The failure to warn and notify the plaintiff of the fact that the ground would be liable to fall in case the same was not promptly timbered after a blast, and the failure to warn and notify the plaintiff that it would be more dangerous to timber up the ground at a later period than it would have been to have timbered it right away.

"(*c*) The failure to furnish the plaintiff with a stemmer,

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so that he, the said plaintiff, could carry on his contract and proceed to work at his own contract in the morning, so that said raise could have been timbered right away.

"(*d*) The failure on the part of the defendant to adopt reasonably safe methods of work, and to see that they were carried out, so as to not subject the plaintiff to hazards that were not within his contract of employment."

Upon the trial a verdict was directed in favor of defendant upon the theory that the case was in all respects similar to, and controlled by, *Petaja* v. *Mining Co.*, 106 Mich. 463 (64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505). Plaintiff has brought the case here by writ of error.

BROOKE, J. (*after stating the facts*). As to plaintiff's claims of negligence under the heads "*a*," "*c*," and "*d*," we are of opinion that the case falls directly within the principles of the decision in *Petaja* v. *Mining Co.*, *supra*. This leaves for consideration only the alleged negligence of defendant set out under "*b*."

The record shows that, except between February 27th and April 14th, plaintiff had had no experience as an iron miner. He testified he did not know that, if the roof was allowed to stand several hours longer than usual, there was greater danger of the fall of a large body of ore from the roof, due to continued earth pressure from above. He further testified that he was never warned of this extraordinary danger. There is abundant testimony in the record tending to show that, if the timbering was not done promptly, the danger would be greater by reason of the earth pressure.

The questions involved, therefore, are:

(1) Was the risk or danger greater by reason of the delay in timbering?

(2) Did the plaintiff understand the additional risk, if there was any, or should he have understood and appreciated it, if exercising ordinary prudence?

(3) If there was an added danger by reason of the delay, was there a duty on the part of the defendant to warn plaintiff of it?

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Baldwin on Personal Injuries, § 347, lays down the following rule:

"The general rule is that it is the master's duty to instruct the servant as to the character of risks to be run, which he will not discover by the exercise of ordinary care. Where the danger is not undisclosed, and the servant is a mature man doing ordinary work, he assumes such risks as are obivious, and negligence will not be imputed to the master for an accident therefrom."

In *Ribich* v. *Smelting Co.*, 123 Mich. 401 (82 N. W. 279, 48 L. R. A. 649, 81 Am. St. Rep. 215), it was said:

"Where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, so far as possible"—citing *Smith* v. *Car Works*, 60 Mich. 501 (27 N. W. 662, 1 Am. St. Rep. 542).

See, also, *Hoffman* v. *Adams*, 106 Mich. 111 (64 N. W. 7); *Barr* v. *Cask Co.*, 129 Mich. 278 (88 N. W. 640); *La Barre* v. *Railway Co.*, 133 Mich. 192 (94 N. W. 735); *Geller* v. *Manufacturing Co.*, 136 Mich. 330 (99 N. W. 281); *Brockmiller* v. *Industrial Works*, 148 Mich. 642 (112 N. W. 688); *Lehto* v. *Mining Co.*, 152 Mich. 412 (116 N. W. 405).

It is strenuously urged on behalf of the defendant that the examination of the plaintiff himself shows that he was fully aware of the danger of injury from falling ore, and that to have given the warning, which plaintiff complains he did not receive, would have conveyed no information to plaintiff which he did not already possess; *i. e.*, that ore from the roof of the raise was liable to fall at any time. There can be no doubt that plaintiff knew that ore, in small quantities, was liable to drop at any time, and it may be true that he knew, or should have learned from his experience and the character of the ore in which he was working, that a delay of six hours would be likely, or at any rate liable, to cause a large mass to become dislodged. The knowledge of this danger, if he possessed it,

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or if, in the exercise of ordinary prudence, he should have possessed it, would prevent plaintiff's recovery, even if it should be determined that defendant owed him the duty of warning.

Under all the circumstances disclosed by this record, we think the jury should have been instructed to determine:

(1) Whether or not the delay in timbering increased the danger.

(2) Whether or not plaintiff knew, or in the exercise of ordinary prudence should have known, of the increased danger.

(3) Taking into consideration plaintiff's experience and the knowledge he had gained of the character of the ore in which he was working, did defendant owe him the duty of warning him of the increased danger, if such existed?

The judgment is reversed, and a new trial ordered.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

PAUL v. BENZIE CIRCUIT JUDGE.

CRIMINAL LAW—MANDAMUS—FORMER JEOPARDY.

Mandamus will not issue to compel a circuit judge to vacate an order discharging a respondent accused of violating the local-option law, where it appeared that respondent stood mute, a plea of not guilty was entered, a jury selected and sworn, and the testimony for the people had been partly introduced, after which respondent was discharged on the ground that prohibition was not duly adopted in Benzie county; since he had been placed in jeopardy for the offense with which he was charged.

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Mandamus by Marion G. Paul, prosecuting attorney of Benzie county, to compel Fred S. Lamb, circuit judge, to set aside an order discharging respondent in a criminal case, and to proceed with his trial. Submitted October 17, 1910. (Calendar No. 24,268.) Writ denied December 7, 1910.

M. G. Paul, in pro. per.

D. G. F. Warner, for respondent.

BROOKE, J. This is an application for a writ of mandamus commanding respondent to vacate an order made by him in a certain criminal case then pending in the circuit court for the county of Benzie; said case being entitled the *People* v. *Chandler Rowe*. It appears that Rowe was on trial, charged with the offense of unlawfully selling intoxicating liquor in Benzie county; it being claimed by the prosecution that such sale was prohibited by virtue of an election held, and a resolution passed by the board of supervisors, in the spring of 1909. After the prosecution had offered in evidence the record of the proceedings of the board of supervisors touching the adoption of prohibition in said county, counsel for Rowe moved that he be discharged. This motion was granted, and respondent was discharged.

It is the contention of relator that by a writ of mandamus the respondent should be ordered to set aside and vacate his order of discharge, and proceed with the trial. We are of the opinion that this cannot be done. Rowe was upon trial under a plea of "not guilty." After a jury was sworn and the testimony of the people introduced, his discharge was ordered by the court. He cannot again be placed in jeopardy.

The writ is denied.

BIRD, C. J., and OSTRANDER, BLAIR, and STONE, JJ., concurred.

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OSBORNE v. READING CENTRAL TELEPHONE CO.

TELEGRAPHS AND TELEPHONES — DUTY TO RENDER SERVICE — STATUTES.

Plaintiff was a stockholder of a local telephone company which had a contract with defendant to render to its subscribers telephone service with independent telephone systems in the county. Plaintiff's brother was a member of an unincorporated independent association, in the same county, which had entered into a contract with defendant to connect its lines with the switch board of defendant. Under the agreement the independent association contracted to pay all transfer charges and messenger fees incurred by its members, and an annual fee, to the defendant; amounts so incurred to be a charge upon the individual member of the association who incurred the charge. Although defendant's contract with plaintiff's company provided that service might be refused to delinquent subscribers, no such provision appeared in the contract with the independent association. Defendant, on numerous occasions, refused plaintiff connections with the telephone of his brother, a member of the voluntary association, alleging as a reason for its refusal, that the brother was in arrears for certain charges. Plaintiff brought assumpsit to recover the penalties imposed under 2 Comp. Laws, § 5270, for refusing to render the service. *Held*, that, under the contract of the voluntary association, of which the delinquent was a member, the association was primarily liable for the fees, and defendant was bound to furnish connection with his telephone at plaintiff's request.

Error to Hillsdale; Chester, J. Submitted October 24, 1910. (Docket No. 6.) Decided December 7, 1910.

Assumpsit by Byron S. Osborne and the people of the State of Michigan against the Reading Central Telephone Company to recover a statutory penalty. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

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Paul W. Chase, Prosecuting Attorney, and *Spencer D. Bishopp* (*F. A. Lyon*, of counsel), for appellants.

Frankhauser & Cornell, for appellee.

STONE, J. An action of assumpsit was brought in the circuit court for the county of Hillsdale to recover the statutory penalty provided by section 5270, 2 Comp. Laws, being Act No. 72 of the Public Acts of 1883, entitled "An act relating to telephone companies, and to regulate the use and rental of telephones in this State." Said statute, so far as applicable to this case, reads as follows:

"It shall be the duty of every telephone company, or person, firm, or corporation, engaged in the business of leasing telephones to the public, or supplying the public with telephones and telephonic service, or operating a telephone exchange, to receive and transmit without discrimination messages from and for any other company, person or persons, upon payment or tender of the usual or customary charges therefor, and upon payment or tender of the usual or customary charges, or usual or customary rental sum * * * to furnish without unreasonable delay, without discrimination, and without any further or additional charge * * * a telephone or telephones, with all the proper or necessary wires and fixtures, and the use of such telephones, wires and fixtures, as well as connection with the central office or telephone exchange, if desired, and shall connect the telephone of such person, firm, or corporation with the telephone of any other person, firm, or corporation having connection with the same, or a connecting exchange or central office, whenever requested so to do. * * * Every company, person, firm, or corporation neglecting or refusing to comply with any of the provisions of this act, shall forfeit all right to transact a telephone business in this State, and may be enjoined therefrom, and from leasing telephones to the public, from supplying the public telephones and telephonic service, and from operating a telephone exchange * * * by any person, firm, or corporation injured, interested or denied any of the rights herein given, or * * * shall forfeit not less than twenty-five dollars, nor more than one hundred dollars, for each and every day such neglect or refusal shall continue, one-half to the person * * * prosecuting therefor."

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It appeared upon the trial that the defendant was organized January 19, 1904, under Act No. 129 of the Public Acts of 1883, entitled "An act for the organization of telephone and messenger service companies," being chapter 177 of the Compiled Laws, and acts amendatory thereto. Acts Nos. 16, 93, Pub. Acts 1899. Its principal office is located in the village of Reading, in said county, where it has, in connection with its other business and equipment, a switchboard, which is used not only for its business, but as well for other companies having contract relations with it, as will hereafter appear. The Reading Telephone Company, of which the plaintiff, Byron S. Osborne, is a stockholder and subscriber, is also a corporation organized under the same act as the defendant, and was incorporated on April 18, 1903, and was reorganized and reincorporated on April 12, 1904. The Central Cambria Telephone Company is a voluntary, unincorporated association composed of 12 or more members, including one Wellington D. Osborne.

On June 1, 1905, the Reading Telephone Company entered into a written contract with the defendant. The object of said contract was therein stated as follows:

"The object of this contract is to encourage and build up a united, permanent telephone system in the vicinity of Reading, Mich., and to encourage free, independent exchange service through the county of Hillsdale among subscribers to independent systems; to the end that each party hereto may be protected and encouraged to build in its respective fields, without fear of encroachment, and each be protected from its absorption by antagonistic companies; and this object shall be maintained in letter and spirit, and a breach hereof shall constitute a forfeiture of all rights hereunder."

It was provided in said contract that the defendant was to do the switching for the said Reading Telephone company, at its switchboard in the village of Reading. The ninth clause of said contract was as follows:

"First party (the Reading Telephone Company) agrees to pay second party (the defendant) in consideration of

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the agreements of second party, and the services herein set forth to be performed, a switch fee of three ($3.00) dollars per annum for each telephone connected with first party's lines, payable quarterly in advance. First party also agrees to pay second party as they occur all messenger fees, and also transfer charges and tolls, and other charges incurred on account of any subscriber to first party; such charges and the switchboard fee above specified to be a charge against the individual subscriber of first party in whose interest they occur. All charges to be payable at the company's office in the village of Reading. In case any subscriber shall refuse, or for the space of fifteen days neglect to pay to second party when due charges or fees as above, second party may, at its option, refuse further service until all arrearages are paid, and such subscribers shall not be entitled to any rebate on account of service having been denied pending payment."

Under and by virtue of the said contract the defendant had done the switching for the Reading Telephone Company from the date of the contract to the time of the trial of the case. In January, 1904, said voluntary association, known as the Central Cambria Telephone Company, entered into a contract with the defendant for the construction of rural lines by said Central Cambria Telephone Company, and the connection of its lines with the switchboard of the defendant in the village of Reading. This contract provided, among other things, that the Central Cambria Telephone Company was to have the right to string a line of wire on the trunk line poles of the defendant, which extend from the village of Reading to the city of Hillsdale; this privilege to extend to three miles of such line, namely, from the Petrie schoolhouse in Cambria, so called, to the corners below Burch's residence, near Reading, upon certain conditions relating to the setting of poles. Said contract contained the following language:

"First party (the defendant) to do the cross-arming and assist in bracing the line, and to give second party (Central Cambria Telephone Company) free use of its exchange in the village of Reading, and of its trunk line from Reading to Hillsdale, also such other free privileges as are accorded other lines connected with its switchboard

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in the village of Reading, upon the payment of a switchboard charge of $3.00 per annum for each telephone on second party's lines; said $3.00 per annum to be paid quarterly on or before the middle of each quarter. It is further agreed by second party that no telephone shall be attached to its line except such instruments as are approved by first party. First party also agrees, in consideration of the agreements of second party, and of the payments herein specified, to keep the poles and lines in repair, including line of second party on said trunk line poles, free of charge to second party for a period of ten years, during which time second party's line is to be connected with first party's switchboard in the village of Reading; first party meeting the wires of second party at the corner one mile east of the center of the village of Reading. It being understood that no telephones shall be attached to second party's line, not approved by it, and no telephones shall be attached to second party's line within the village of Reading, except through first party's switchboard. Second party agrees to pay first party, as they occur, all transfer charges and messenger fees incurred on account of any member of second party. Such charges and switchboard fee of $3.00 per annum above specified to be a charge upon the individual member of the second party in whose interest they occur."

Business had been carried on under this contract down to the time of the trial.

It appeared that Wellington D. Osborne, one of the members of the Central Cambria Telephone Company, is a brother of the plaintiff, Byron S. Osborne, and lived about two miles from the residence of said plaintiff, and on the line of said Central Cambria Telephone Company. During the time complained of in the pleadings, it became necessary for said plaintiff to use the telephone in communicating with his brother, Wellington D. Osborne, on account of sickness in the latter's family. On July 29, 1907, and on several subsequent occasions, said plaintiff attempted to get telephone communication with Wellington D. through the switchboard of the defendant, in the village of Reading, and was by defendant refused. The reason given was that Wellington D. had not paid his

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switch fees. This, however, was denied by said plaintiff, as he claimed he had paid said fees for his brother, Wellington D., and that no more switch fees were due until August 15, 1907. This claim the court found to be true. Upon the trial, however, it appeared, for the first time, that there was a small amount of toll service unpaid for long distance service rendered to Wellington D. It also appeared that, during the time the defendant was refusing to give said plaintiff connection with the telephone of Wellington D., at least three other persons were permitted, by defendant, to telephone to said Wellington D. through the switchboard of the defendant, and it was the claim of the plaintiffs that this conduct of the defendant amounted to a discrimination within the meaning of the statute. Upon the trial the following general rule of defendant was received in evidence, under the heading "Long Distance or Trunk Line Service:"

"Toll line service will be charged to the subscriber from whose instrument the toll message is sent. If not willing to guarantee charges, do not allow others to use your 'phone."

It appeared that Wellington D. Osborne had seen a copy of said rule. At the close of the testimony, the counsel for defendant moved for the direction of a verdict for the defendant upon the ground that at the time the defendant shut off the said plaintiff from talking with his brother, Wellington D., the latter owed the defendant for toll service. This motion was granted. In directing the jury to find a verdict for the defendant, the court found that Wellington D. was not in default in his payment of the switch fees at the time of the refusal to said Byron S. Osborne; but the court based its ruling solely upon the ground that at that time there was a small amount of long distance service that was unpaid, and which Wellington D. owed defendant. The plaintiffs have brought error, and the only questions urged are whether the court erred in directing a verdict and judg-

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ment for the defendant, and in not submitting the case to the jury.

Counsel agree that there is really but one question to be considered, and that is whether the nonpayment of the small amount due defendant for long distance service justified it in refusing to give Byron S. Osborne connection with the telephone of Wellington D. Osborne.

It should be borne in mind that the plaintiff, Byron S. Osborne, was in no wise in default; and this brings us to note the difference between the two contracts. The contract with the Reading Telephone Company, of which Byron S. Osborne was a stockholder and subscriber, contained an express provision that in case any subscriber should refuse, or for the space of 15 days should neglect, to pay the defendant, when due, charges or fees, the defendant might at its option refuse further service. There is no such provision, either in form or substance, in the contract with the Central Cambria Telephone Company, of which Wellington D. Osborne was a member. He and the other associates are not even called "subscribers," but "members." They were members of the voluntary association. In our opinion this difference was not a mere accident. The relation between the association and defendant was created by the special contract above set forth, and we do not think that the general rules of the defendant applied either to such association or to its members.

In the contract between the association and the defendant it was expressly provided that:

"Second party (the Central Cambria Telephone Company) agrees to pay first party (defendant), as they occur, all transfer charges and messenger fees incurred on account of any member of second party."

In our opinion, the primary obligation to pay is on the Central Cambria Telephone Company, and not upon its members, and the defendant should, under the terms of the contract, look to the association for its pay; and it cannot invoke its general rules, applicable to subscribers,

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in this case. If it could do so, it would have an equal right to shut off every member of the association, for the debt, default, or obligation of the Central Cambria Telephone Company.

The debt or default here complained of was, under the contract, primarily the debt or default of such association, and not of its members. True, it might in the end be charged by the association to the individual member thereof; but this did not change the right or duty of the defendant.

We are of opinion, therefore, that the circuit court erred in directing a verdict for the defendant. Upon the retrial of this case it may become a question for the jury whether there was a deliberate and wilful violation of the statute on the part of the defendant. For the error pointed out, the judgment of the court below is reversed, and a new trial granted.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

PEOPLE *v.* McDONALD.

1. BURGLARY—IDENTITY OF PROPERTY—POSSESSION.
   In a prosecution for burglarizing an office, from which some caps, dynamite and fuse were stolen, testimony that the property was found concealed a couple of feet from where the respondents were arrested, two days after the crime, warranted the submission to the jury of the question whether or not respondents were in possession of it.

2. SAME—EVIDENCE OF IDENTITY.
   While the prosecution failed to identify positively the articles

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found on respondents, with the stolen property, there was sufficient evidence to support the finding of the jury, where the stolen property was of the same kind and character as the respondents had, and was found on the morning of the second day following the crime.

8. SAME—LARCENY—POSSESSION OF STOLEN GOODS.

The possession of the stolen property, standing alone, is not even *prima facie* evidence that the person in whose possession it was found, committed the burglary, and although such proof unexplained is *prima facie* evidence of larceny, it will not sustain a conviction for burglary, unaccompanied by testimony of other facts and circumstances indicating the guilt of respondents.[1]

Error to Jackson; Parkinson, J. Submitted October 21, 1910. (Docket No. 143.) Decided December 7, 1910.

Benjamin McDonald and John Mason were convicted of the statutory offense of breaking and entering in the nighttime, an office not adjoining to or occupied with a dwelling house, with intent to commit larceny, and were sentenced to hard labor for a minimum period of seven years. Reversed.

James J. Noon, for appellants.

Albert O. Reece, Prosecuting Attorney, and *Frank L. Blackman*, Assistant Prosecuting Attorney, for the people.

BROOKE, J. Respondents were convicted of breaking and entering an office in the nighttime, with intent to commit the crime of larceny. The material facts are as follows: The American Sewer Pipe Company maintains a small structure at its clay pit, about four miles outside the city of Jackson. This building was closed and locked at 4:30 o'clock on the afternoon of Friday, October 1, 1909. At 6 o'clock on the following morning, it was

[1] As to presumption of burglary from possession of recently stolen property, see note to *State* v. *Brady* (Iowa), 12 L. R. A. (N. S.) 199.

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found to have been broken open. A small quantity of dynamite, some caps, and fuse were missed. On Sunday morning respondents were arrested upon the Michigan Central track in or near Jackson. After they were lodged in jail, the officers returned to the spot where the arrest was made and discovered, in that immediate vicinity, under some weeds, a parcel containing dynamite, fuse, and caps, and a revolver with a black mask tied around it. Cartridges corresponding in caliber to those in the revolver were found upon the person of respondent McDonald. While the dynamite, caps, and fuse, being common articles of commerce, were not positively identified as the property of the sewer pipe company, it was shown that they were in all respects similar to the property taken. About a month later, another parcel with like contents was found along the railway tracks, at a point some distance away from the place where the first parcel was discovered. The information contained two counts; one charging burglary, and the other larceny from an office in the daytime. After the proofs were closed, the prosecuting attorney dismissed the latter count, and the court, over objection, submitted the case to the jury upon the burglary charge alone.

Respondents denied possession of the property. While it is true, as urged by respondents, that none of it was found upon their persons when they were apprehended, yet it was found concealed at a point so close to where they were when arrested (less than two feet) and so near in point of time to the commission of the crime, we are of opinion that the question of whether or not respondents, at the moment of their arrest, were in the actual possession of the stolen property, was a question for the jury. Upon this question the court instructed the jury at length and properly.

The failure of the prosecution to positively identify any of the articles taken as the property of the American Sewer Pipe Company was made the ground of a motion for a direction of a verdict of "not guilty." This motion

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was overruled. The evidence as to identity was heard by the jury, who evidently determined that, while not positive, it was sufficiently persuasive to warrant them in finding, beyond a reasonable doubt, that the property discovered by the officers on Sunday morning was the same property which had been stolen from the building of the American Sewer Pipe Company on Friday night. Assuming the possession to have been proven to the satisfaction of the jury, and such possession not being explained by respondents as innocent, we think the testimony as to identity sufficient to support the determination of the jury.

But assuming the identity of the property with that stolen, and further assuming that it was actually in possession of respondents at the time of their arrest, we think they could not properly be convicted of burglarly. This court is committed to the doctrine that the possession of stolen property, standing alone, is not even *prima facie* evidence that the person in whose possession it was found committed the burglary. *People* v. *Gordon*, 40 Mich. 716; *Stuart* v. *People*, 42 Mich. 255 (3 N. W. 863). Beyond the mere fact of possession (if that be shown), there is absolutely nothing in this record connecting the respondents with the commission of the crime. In this the case is clearly distinguishable from the case of *People* v. *Wood*, 99 Mich. 620 (58 N. W. 638), upon which the learned circuit judge evidently relied. There, the respondent was seen with his two companions going in the direction of the scene of the burglary, in a conveyance which, by reason of certain peculiarities, was readily traced from the place burglarized to the home of one of respondent's companions. Here, there is not a scintilla of evidence that either of the respondents were ever even in the vicinity of the clay pit where the crime was committed. The unexplained possession of property recently stolen is *prima facie* evidence of larceny (*People* v. *Carroll*, 54 Mich. 334 [20 N. W. 66]), but, unaccompanied

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by other facts or circumstances indicating guilt, will not sustain a conviction for burglary.

The judgment must be reversed, and a new trial ordered.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

In re HOWARD'S ESTATE.

LINTON *v.* HOWARD.

1. WITNESSES — STATUTES — TRANSACTIONS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

   Where claimant filed an account as trustee of her father's estate, under the terms of a will giving her the use of his real and personal property during the lifetime of his widow, conditioned upon claimant's supporting and caring for her during her lifetime, the testimony of claimant relating to matters occurring after testator's death, but within the knowledge of the deceased widow, was admissible.

2. ESTATES OF DECEDENTS—ACCOUNTING—TRUSTS—QUESTIONS FOR JURY.

   It was proper to submit to the jury, questions of fact raised by evidence in support of claimant's claim against the estate, as trustee, for expenditures and care in executing the trust, created by testator's will, which conferred upon the claimant authority to sell property if necessary to carry out its provisions.

3. SAME—TRUSTS.

   The use or usufruct of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy and have the fruit thereof. If the thing to be used is in the form of real estate, the use is its occupancy or cultivation or the rent obtainable for it; if it is money or an equivalent, generally speaking, it is the interest which it will earn.

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4. SAME—CONSTRUCTION OF WILLS.
Whether or not the trustee had power to sell real estate, where it is undisputed that she did not sell it or attempt to do so, but necessarily incurred expense in excess of the income from the estate in her possession, she was entitled to recover, in any event, the amount which the jury might find she had so expended.

5. SAME—TRUSTS—TRIAL.
The claim of the trustee, presented in probate court against such estate, is properly treated, on appeal to the circuit court, as an action at law, instead of being treated as a settlement of a trustee's account, on the equity side of the court. 1 Comp. Laws, § 673, Act No. 253, Pub. Acts 1899.

Error to Calhoun; North, J. Submitted October 25, 1910. (Docket No. 103.) Decided December 7, 1910.

Carrie Linton presented a claim in probate court for the county of Calhoun, for the support and maintenance of the widow of John W. Howard, under trust provisions of his last will. Eugene Howard appealed from the allowance of the claimant's account and claim to the circuit court. Judgment for claimant; contestant brings error. Affirmed.

Jesse M. Hatch, for appellant.

M. H. Nichols, for appellee.

STONE, J. This claim originated in the probate court of Calhoun county, where the claimant, Carrie Linton, as trustee of the estate of John W. Howard, deceased, filed a claim for the support and maintenance of her mother, Sarah Howard. The claim having been allowed in the probate court, an appeal was taken by Eugene Howard, one of the heirs and legatees under his father's will, to the circuit court of said county, where the case was tried by a jury and resulted in the recovery by the claimant of the sum of $540.15. The alleged claim is founded upon the provisions of the will of John W. Howard, deceased, who died on the 29th day of January, 1896, leaving a last

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will and testament, which was duly admitted to probate on the 16th day of March, 1896.

The provisions of said will pertinent to this issue are as follows: After providing for the payment of his just debts, last sickness, and funeral expenses, the will proceeds:

"(2) After which I give and bequeath to each of my ten children, the sum of $50 to be payable as soon as may be after my death, their names being as follows: Martha Launstein of Chesaning, Michigan, George Howard, Concord, Kansas, Harry Howard, Homer, Michigan, Eugene Howard, Washeugle, Washington, Louisa Launstein, Kane, Pa., Jennie C. Loomis, N. Y., Willard Howard, Falkton, Dakota, Carrie Linton, Paw Paw, Michigan, Ella Anderson, Falkton, Dakota, Frank Howard, Falkton, Dakota, but said bequest to my said daughter, Carrie Linton, is to be paid by the delivery to her of the kitchen range or cook stove, now in use in my house, but in case such range or cook stove is not owned by me, at the date of my death, then $50 shall be paid to said Carrie Linton in lieu thereof.

"(3) I hereby give and bequeath to my said daughter, Carrie Linton, the use of my real and personal estate, during the lifetime of my wife, Sarah Howard, conditioned upon her caring for, providing a home and supporting in a reasonable manner, paying her last sickness and funeral expenses, according to her condition in life, my said wife, Sarah Howard; and in carrying out said trust (supporting my said wife as aforesaid) said Carrie Linton is authorized and shall have power to use any real and personal property, out of my estate, as shall be found necessary to properly and adequately carry out and perform said trust.

"(4) To my said wife I give and bequeath the benefits that are to accrue by the performance of said trust by my daughter, Carrie Linton, and it is my intention that any sum derived from the income and use of my estate, over and above what shall be necessary to carry out said trust, during the lifetime of my said wife, shall be and remain the sole property of said Carrie Linton.

"(5) All the rest, residue and remainder of my estate, after the payment of said legacies, and the performance of the conditions of said trust, for the care of my said wife, it is my will, and I hereby, as to any residue or re-

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mainder that shall then remain in my estate, give, devise, and bequeath the same to my said ten children above mentioned, share and share alike as near as may be, or as nearly as the property can be divided."

After the death of her father, the claimant, as trustee under the will, took possession of the real estate, consisting of one farm of 80 acres inventoried at $1,300, and all of the personal estate left by the testator, which latter was of little value, and proceeded to care for and maintain her mother, in accordance with the provisions of the will, down to the death of the mother, which occurred on the 19th day of October, 1908. For nearly 13 years the claimant cared for and supported her mother in a suitable manner, and paid the taxes on the farm. During the last years of her life the mother was in poor health, requiring much care and considerable medical aid. After the death of the mother, the administrator of the estate, who had not been discharged, made application to the probate court for leave to sell the real estate, for distribution. After the sale had been ordered and made, and after the administrator had asked to have his account allowed, this claim was filed. It is made up of items of expenditures, and the alleged cost or value of the care and nursing of the mother of claimant on the one hand, and the value of the use of the farm on the other hand. Upon the question of fact the controversy was as to the value of the use of the farm during the years claimant had it in possession; and there seemed to be little or no question as to the expenditures for doctor's bills and other charges.

Upon the trial it was the contention of the appellant, that from the whole will it was clear that the testator intended to give only the use of the estate to the claimant in trust, conditioned upon the care and support of his widow, and that that construction should be placed upon the will, which, if possible, would give force and effect to every clause therein; and that the words, "the use of," and, "to use," should be given their ordinary meaning. It was further contended that the claimant never intended

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to make any charges for the support of her mother, and that she was to be recompensed by the use of the real estate and the personal property which she appropriated. At the close of the testimony of the claimant, the appellant moved the court for a directed verdict against the claimant for the reasons above stated, among others. This was refused, and, after offering certain evidence as to the value of the use of the farm, the case was submitted to the jury, by the circuit judge, and the following excerpt from the charge will clearly show the views of the circuit judge as to the proper construction of this will:

"I charge you, as a matter of law, gentlemen, that the intention of the testator, as drawn from the will itself, was, that his widow should be cared for in a reasonable manner; that, so far as it was sufficient, the income of the estate which the testator left should be used to do for his widow, what he himself if living would have done in the way of giving her reasonable care, support, and maintenance. The duty of this disposition of the said property is devolved by the will upon Carrie Linton, one of the testator's daughters, and the claimant here in this case, who, as you already understand from that portion of the will, was designated as trustee to carry out this trust created by Mr. Howard, and under the legal construction that must be given to this instrument, the will also gave Carrie Linton not only the right to use so much of the estate as was necessary to properly care for her mother, but it enjoined upon her, as a duty, to carry out the trust in properly and adequately caring for and supporting her mother, even to the extent of using the body of the estate, or, if necessary, even to the extent of the whole of the estate as contradistinguished from using only the income derived from the estate left by Mr. Howard; and the trustee, Mrs. Linton, was not bound to keep within the income if the same was insufficient for the purpose of carrying out the trust provided for in the will in a proper manner. If Carrie Linton, the trustee, properly and adequately carried out the trust imposed upon her by the will of her father, in caring for and supporting her mother during her mother's lifetime, and in doing so it became necessary for Mrs. Linton to perform extra services and

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expend more money than the income from the farm and the personal property, which the evidence shows she received, then Mrs. Linton is entitled to be reimbursed for all the money she expended in so caring for her mother, and for all the extra time and care which she gave, or which was necessary in order to give her mother the proper care which she did give her, in so far as you find the same shown by the evidence; and also she is entitled to be reimbursed for such amounts as were paid for doctors' bills, for nursing, if any, and the expenses of sickness and funeral expenses over and above the net income from the farm and the personal property which she admits having received from the hands of the administrator of her father's estate, as all of these items to which I have called your attention would be valid claims against the estate of John Howard, under the terms of the will from which I have just quoted."

The appellant brings the case here upon writ of error and assigns error:

(1) That the court erred in permitting claimant to testify to matters equally within the knowledge of John W. Howard and Sarah Howard, both being deceased.

(2) Because the court erred in not directing a verdict for appellant on the motion made by his attorney at the close of claimant's proofs.

(3) That the court erred in construing the will of John W. Howard, deceased, and in holding that said will gave to claimant as trustee more than the use of the real estate.

(4) The court erred in construing the will of John W. Howard, deceased, and in holding that it passed the whole of the real estate to the claimant, if the same was necessary, to properly support her mother.

(5) Alleged error in treating the case as a suit at law, and in submitting the same to the jury.

1. Referring to the first assignment of error, it must be held that an examination of the record fails to disclose any testimony of claimant, relating to matters that were equally within the knowledge of John W. Howard, the testator. Her testimony relates solely to matters arising after his death. We do not think that the statute applies to matters equally within the knowledge of the deceased mother, Sarah Howard.

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2. We are of the opinion that there were questions of fact for the jury to consider, and that the circuit judge did not err in refusing to take the case from them.

3, 4. The third and fourth assignments of error may be considered together. Undoubtedly the general rule is that the use, or usufruct of a thing, does not mean the thing itself, but means that the user is to enjoy, hold, occupy, and have the fruit thereof. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy, or cultivation, etc., or the rent which can be obtained for the same. If it is money or its equivalent, generally speaking, it is the interest which it will earn. 29 Am. & Eng. Enc. Law (2d Ed.), p. 444. The term "use of" has, in some cases in this court, been held to be ambiguous. *Proctor* v. *Robinson*, 35 Mich. 284; *Patterson* v. *Stewart*, 38 Mich. 402.

In any view of this case, it is not necessary to decide whether the claimant had the power under the will to sell the real estate, in any event. The fact is undisputed that she did not sell it, or attempt to sell it. She cared for it, and paid the taxes assessed thereon, and saved it to the estate. The primary object of the testator, in so far as Sarah Howard was concerned, was, that she should have reasonable care and support, in sickness and in health, "according to her condition in life." This care and support was committed to the claimant, who was authorized to use the property belonging to the estate for that purpose, "as shall be found necessary to properly and adequately carry out and perform said trust." The proper care and support of his widow, and not the creating of a life estate, seems to have been the purpose of the testator. If in carrying out this object and purpose the claimant found it necessary to incur more expense, and pay out more money than she received from the reasonable use and income of the property placed in her possession, then it would seem just that she should be reimbursed out of the said estate to the extent of such excess. That seems to be just what the claimant is seeking here to do, and

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with that end in view, she has filed this claim against the estate as a creditor thereof.

So it appears to us that, in any view of the case, the circuit judge did not err in submitting the question of claimant's right to recover, and the amount of such recovery to the jury, whether he correctly construed the will or not. If he did not, it was error without prejudice, if they found, as they must have found, that she necessarily expended, and became liable for, "more money than the income from the farm, and the personal property which the evidence shows she received" were worth. We find no reversible error here.

5. Did the court err in treating the case as a suit at law, and in submitting it to a jury? Appellant's counsel contends that trusts belong to the jurisdiction of equity, and that this was the settlement of a trustee's account. We do not think that the case presented the ordinary settlement of a trustee's account, or that the cases cited by counsel relating to the ordinary settlement of a guardian's account for services, as such, apply here. It is a claim filed in the probate court against the estate for the support of the widow of the deceased; the estate having been by the will charged with her support. It presented the usual questions of fact, which were properly submitted to a jury. *Mower's Appeal*, 48 Mich. 441 (12 N. W. 646). The issue was whether or not the claimant had expended more than the income of the farm, which was turned over to her under the terms of the will, in the care of her mother, and, if so, how much. The issue was made on the account filed in the probate court, and, on the trial of the appeal in the circuit court, the claimant was entitled to a trial by jury. Section 673, 1 Comp. Laws, and cases cited in note to section; *Grovier* v. *Hall*, 23 Mich. 7.

Even if the case be treated as falling within the provisions of Act No. 253 of the Public Acts of 1899, relating to testamentary trusts, the right to settle the account in the probate court remains, and section 42 of the act expressly provides for an appeal, in the following language:

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"The decree of the probate court upon the settlement of the account of any testamentary trustee, as herein provided, or any other order or decree of the probate court, made pursuant to any provision of this act, may be appealed from in the manner provided by law for appeals from other orders, sentences, decrees, or denials of a judge of probate, and the like proceedings shall be had upon such appeal," etc.

See *Cole* v. *Cole's Estate*, 125 Mich. 655 (85 N. W. 113).

The judgment of the circuit court is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

YOST *v.* GRAND TRUNK RAILWAY CO.

PARENT AND CHILD — NEGLIGENCE — LOSS OF SERVICES — ABANDONMENT BY FATHER.

Since it is the duty of a child, if it is able, to support its indigent parent (2 Comp. Laws, §§ 4487, 4490), and of the parent to maintain a minor child, if necessary (2 Comp. Laws, § 4495), a wife, whose husband has deserted her and her minor children, may recover for loss of the services of her minor son, caused by the negligent act of defendant.

Error to Wayne; Murfin, J. Submitted October 25, 1910. (Docket No. 25.) Decided December 7, 1910.

Case by Sarah Yost against the Grand Trunk Railway Company, a foreign corporation, for negligent injuries to her infant son. Plaintiff obtained judgment in justice's court, and defendant appealed to the circuit court. A

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judgment for defendant on verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Clarence P. Milligan and *Harry C. Milligan*, for appellant.

Harrison Geer (*W. K. Williams*, of counsel), for appellee.

MOORE, J. This case was commenced in justice's court. It is stated in the declaration of the plaintiff, in substance, that the plaintiff is the mother of Harry Yost, a minor, who was wrongfully employed by the defendant at a hazardous occupation, against the knowledge and consent of plaintiff; that while in a position of extreme hazard and danger the minor was injured and deprived of his left hand, by reason of which injury the plaintiff lost the services of the said minor permanently. It is further averred that plaintiff became obligated to pay physician's bills, nurse bills, and medicine bills for said minor. The defendant pleaded the general issue. A trial was had which resulted in a verdict and judgment of upwards of $300 in favor of the plaintiff. The case was appealed to the circuit court. Upon the trial in the circuit court the plaintiff gave testimony to the effect that she was the mother of Harry Yost, a minor, who was with his sister living at home with plaintiff and aiding in her support; that plaintiff relied solely upon the earnings of the minor and his sister for her support; that her husband had not supported or lived with her in 15 years; that she did not know his whereabouts and had not heard from him in four years, when he was in Chicago. She further testified that the husband had not supported the children in 15 years. She testified to the injury received by her son, and that by reason of the injury she was deprived of the earnings of her son. The record shows the following:

"After the close of the testimony the defendant moved for a verdict in its favor for the reason that the plaintiff was not entitled to the services of the minor, but that the

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same belonged to the father, which motion was granted by the judge and a verdict directed for the defendant, to which plaintiff excepted. After the motion for a directed verdict was made plaintiff's counsel offered to show that there had been a divorce between the plaintiff and her husband, but the court stated that such fact did not in his opinion change the situation."

The certificate of the circuit judge is to the effect that the bill of exceptions contains all the testimony and proceedings necessary to the proper understanding of the question of law raised. It clearly appears that upon this record the only question involved is whether the mother can recover for the loss of the services of the minor child.

It is the claim of the defendant that the common law is in force in this State; that primarily the father is entitled to the services of the minor; but conceding that by his conduct he may have lost that right, then the son, and not the mother, is entitled to his services. It is conceded that there is no decision of our own court which is controlling. The plaintiff has cited authorities which, it is urged, are in point. The answer of defendant to this contention is that they are not so, by reason of the statutes in the States from which the decisions come.

The case of *Thompson* v. *Railway Co.* (C. C.), 104 Fed. 845, was one brought under a statute giving a right of action to the next of kin. In disposing of the case the following language is used:

"The statute of the State which is the basis for the present action has been construed in numerous cases by the supreme court. *City of Friend* v. *Burleigh*, 53 Neb. 674 (74 N. W. 50); *Orgall* v. *Railroad Co.*, 46 Neb. 4 (64 N. W. 450); *Chicago, etc., R. Co.* v. *Van Buskirk*, 58 Neb. 252 (78 N. W. 514); *Chicago, etc., R. Co.* v. *Young*, 58 Neb. 678 (79 N. W. 556). An analysis of these cases establishes the doctrine that the facts stated in the petition must show that the next of kin were persons who were dependent upon deceased for their maintenance and support, or that deceased was under a legal obligation to furnish such next of kin support and maintenance, and that the facts must support such allegations

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to entitle the party to recover, under a general claim of damages. If special damages have been sustained by the next of kin, such special damages must be alleged in the petition. They cannot be shown or recovered under a general claim of damages. * * * Under the law in this State there can be no question that the father was the next of kin to deceased, and that the recovery in this case, under the statute in question, can only be had for the damages which it may be reasonably inferred the father has sustained by reason of the death of his minor son. If the petition should be amended, the facts, nevertheless, would remain that the father, more than 10 years prior to the deceased's death, abandoned his wife and deceased, and gave them no support and protection. Under such state of facts, is the father entitled to the services of the son whom he thus abandoned? In Rodgers on Domestic Relations, § 467, it is said:

"'If the father deserts and abandons his family, exercises no control over them, interferes with them in no way, manifests no interest in their welfare, does not communicate with nor look after them, the relation of master and servant is dissolved, and the principle of servitude no longer sustains the right of the father to the wages of his infant son. It is as if the father were dead, and the custody of the child and the right to appropriate his earnings thereby devolve upon the mother. If the father refuses to be a parent in act as well as in name, the law will not recognize his right to control the earnings of his infant child, whom he thus casts aside to neglect.'

"The rule is well settled that, if the father emancipates his minor child, he is no longer entitled to the earnings of such child, and emancipation may be inferred by acts. In 17 Am. & Eng. Enc. Law (1st Ed.), p. 397, it is said:

"'If the parent forces the child to leave the house or deserts or abandons him, the child is released from all filial duties which the law will enforce, and may seek his own welfare in his own way. Thus, an emancipation may be accomplished by wrong and violence.'

"And, as stated by Schouler, Domestic Relations, § 267: 'This is termed the presumption of necessity.' In the note to *Wilson* v. *McMillan*, 35 Am. Rep. 117 (62 Ga. 16), it is said:

"'Emancipation is always presumed in cases of necessity. Thus, if the parent absconds, expels his child, or leaves him to shift for

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himself, and refuses or neglects to provide, emancipation is presumed. * * * It would certainly be a great defect in the laws of any civilized people if they furnished no mode by which the innocence and helplessness of infancy, and the purity and ingenuousness of youth, could be protected from the brutality of an unnatural parent. As a father may forfeit his right to the custody and control of his child's person by abusing his power, so, by neglecting to fulfill the obligations of a father, he may forfeit his right to the fruits of his child's labor. If he provides no home for his protection, if he neither feeds nor clothes him, nor ministers to his wants in sickness or health, it would be a most harsh and unnatural law which authorized the father to appropriate to himself all his child's earnings. * * * But where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle but that of slavery which will continue his right to receive the earnings of the child's labor.'

"Suppose in this case, the motion for a new trial should be sustained, and plaintiff permitted to amend the petition to correspond with the facts, by showing that at the time of the death of deceased his father was living, still plaintiff could not recover as, upon a new trial, the fact must remain the same, that the father abandoned the child years before, in a manner and under circumstances which must be held to be an act of emancipation on the part of the father, and for reason thereof the father is not entitled to, and could not, recover for the services of deceased. Then, under such facts, plaintiff would not even be entitled to judgment for nominal damages. While it is true that, the emancipation on the part of the father being presumed because of his desertion of his child, the right to the earnings of the child would belong to its mother, yet a recovery could not be had in this case, for the reason that the mother was not the next of kin; the father having survived the child."

In Tiffany on Persons & Domestic Relations, at pp. 261 and 262, it is said:

"A parent is only entitled to the services and earnings of his child while the child is supported by him. Although the general principle is clear and unquestioned that the father is entitled to the services of his minor child, and to all that such child earns by his labor, yet it seems to be equally clear that, as the right of the father to the ser-

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vices of the child is founded upon his duty to support and maintain his child, if he should fail, neglect, or refuse to observe and perform this duty, his right to the services of his child should cease to exist; and such we hold to be the law. * * * As the father may forfeit his right to the custody and control of his child's person by abusing his power, so, by neglecting to fulfill the obligations of a father, he may forfeit his right to the fruit of his child's labor. If he provides no home for his protection, if he neither feeds nor clothes him, nor ministers to his wants in sickness or health, it would be a most harsh and unnatural law which authorized the father to appropriate to himself all the child's earnings. It would be recognizing in fathers something like that pre-eminent and sovereign authority which has never been admitted by the jurisprudence of any civilized people, except that of ancient Rome, whose law held children to be the property of the father, and placed them in relation to him, in the category of things instead of that of persons."

At page 256 of the same author the following language is used:

"There is some authority to the effect that the right to a child's services and earnings does not vest in the mother, even when the father has deserted her and the child, or is dead; that the mother, even under such circumstances as these, is entitled only to reverence and respect, and has no authority over the child, or right to its services. This, however, is a mistake, due perhaps, to some extent, to following without reason or other authority the dictum of Blackstone and other old writers and judges to that effect, and to a failure to recognize the fact that there is no longer any such principle or doctrine as the old feudal doctrine which, requiring, as it did, the abject subjection and servitude of the wife, was unable to recognize the supremacy of the mother. By the overwhelming weight of modern authority, a widowed mother is entitled to the services and earnings of a minor child to the same extent as the father would be if living. The same rule applies where a wife is deserted by her husband, or he is imprisoned, and she is left to maintain her children, for the same reasons for the rule apply in both cases."

Many cases are cited in the notes.

Under the provisions of section 4495, 2 Comp. Laws,

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the plaintiff is under obligation, if it becomes necessary, to maintain the minor child and if she has property it would be liable to seizure to secure his maintenance. If the plaintiff is poor, under the provisions of sections 4487 and 4490, 2 Comp. Laws, it would be the duty of the minor child, if able, to maintain her. If the duty of maintenance of the minor child is upon the mother when living separate from her husband, it would be hard lines to say that if his services could be of any value to her she should not be entitled to them. We think the court erred in disposing of the case as a legal question.

Judgment is reversed, and new trial ordered.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

WARD *v.* WARD.

1. PARTITION—TRUSTS—ESTATES.
   Partition will not be granted to a beneficiary under a trust instrument, where the purpose of the trust would be defeated or impaired by a division of the property.

2. TRUSTS—WILLS—CONSTRUCTION.
   Under provisions of a will which creates a trust for a period of twelve years after testator's death, or until the death after his decease of two children within six years, with powers to the trustees to sell, lease, convey, or mortgage the property, or to terminate the trust after six years from his death, the trust does not terminate of itself while all the heirs are living, after six years from testator's death.

3. WILLS—TESTAMENTARY TRUST—VALIDITY.
   A will creating a trust estate in a portion of testator's property for the benefit of his heirs, for a period of twelve years

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after his decease, or until the death of two of his children, giving authority to the trustees to terminate the trust after six years, and to convey and control the trust estate, dividing such sums among the heirs annually as can be so divided with regard to the successful conduct of the trust, and containing provisions for the due distribution of the estate at the termination of the trust, is sufficiently definite and complete to be valid, and creates an estate that is inconsistent with partition at the end of six years.

4. SAME—ESTOPPEL—BRIEF.

By admitting in his bill of complaint and brief that the trust was valid, complainant estopped himself from questioning its validity.

5. SAME—STATUTES.

Nor has 8 Comp. Laws, § 11015, permitting any person except a remainderman having an estate in possession of lands, to bring partition, abrogated the rule that relief will be denied where it will defeat the purpose of such trust.

Appeal from Crawford; Sharpe, J. Submitted October 25, 1910. (Docket No. 60.) Decided December 7, 1910.

Partition by Charles W. Ward against Willis C. Ward and other heirs of David Ward, deceased, and George K. Root, Willis C. Ward and Franklin B. Ward, executors and trustees of the estate of said deceased. From a decree on demurrer, dismissing complainant's bill, he appeals. Affirmed.

John H. Patterson (*Fred A. Baker*, of counsel), for complainant.

Chamberlain, May, Denby & Webster (*Stevenson, Carpenter & Butzel*, of counsel), for defendants.

HOOKER, J. The important questions in this case relate to the validity of a provision of the will of David Ward, deceased, late of Pontiac, and its construction if it shall be found to be valid, and the complainant's right to partition.

The facts necessary to be stated are, briefly, these: David Ward died May 29, 1900. His will was duly ad-

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mitted to probate. The twenty-first paragraph of his will was as follows:

"(21) All the rest, residue and remainder of my estate of whatsoever kind or character and wheresoever situated, I give, devise and bequeath to my trustees hereinafter named and their successors, in trust, nevertheless, to hold, manage, control, care for, and invest and reinvest the same for the period of twelve years from and after my decease or until the death after my decease and prior to the expiration of said period of twelve years, of two of my children who shall survive me, with the right and option, however, resting in my said trustees, and their successors, to terminate said trust at any time after six years from my decease in their sound discretion, and during such trust period, I direct that my said trustees, and their successors, shall manage, control and administer my said estate as one entire business and property, and I hereby confer upon them and clothe them with all powers and authorities necessary, expedient or desirable therefor, whether of sale, mortgage, leasing, contracting or otherwise, it being my intention to vest them with as ample and absolute powers of disposition, management and control thereof, as I myself exercised over and in respect to the same in my lifetime.

"I direct my said trustees and their successors during said trust period to divide annually among my children who shall survive me, share and share alike, such sum, as in their judgment can be so divided and distributed with due regard to the successful, effective and productive management of the said property and estate so held by them in trust.

"Upon the expiration of said period of twelve years from my decease, or upon the death, prior to the termination of said period of the second of my said children dying after my decease or at the option or in the sound discretion of my said trustees or their successors, at any time after six years from my decease, I direct that the trust created by this twenty-first item of my will shall cease and terminate, and the property, funds and estate then embraced in said trust shall vest in my children share and share alike, and I direct my said trustees to pay, turn over and convey, the same to my said children with equal interest and to make, execute and deliver all needful and proper instruments of grant, conveyance, transfer, assignment or contract therefor, but I expressly direct and provide, however, that upon

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the termination of said trust as hereinabove provided, said property, funds and estate then subject to said trust shall so vest in my said children and be so transferred to them, subject to any contracts or obligations respecting or affecting the same, or any part thereof, before then lawfully entered into or incurred by my said trustees.

"And I further explicitly direct that in any distribution made during the existence of said trust, or in the vesting of the property embraced in said trust upon the termination thereof as above provided, the issue of any child then deceased, shall represent such deceased child and take such deceased child's share. I also expressly direct that any amounts which shall be found charged on my books of account against any of my children, or that shall be represented by any promissory notes, duebills, or other evidence of indebtedness to me of any of my children, shall not be taken or treated as advancements on account of the respective shares or portion of said children, but shall be cancelled and held for naught, except that in the case of my son, Charles W. Ward, he shall be charged in the settlement and distribution of my estate with an advancement of fifty thousand dollars, the advancement herein directed to be charged against my son, Charles W. Ward, to supersede and stand in lieu and stead of the advancement specified and agreed upon in the agreement between said Charles W. Ward and myself, dated May 25, 1899."

Charles W. Ward, the complainant, is one of David Ward's children, and heirs, of whom there were six, all of whom are now living. His widow is dead. The residuary estate consists in part of 70,000 acres of timbered land in northern Michigan, appraised in probate court at $3,819,587.25. The timber is valuable, and complainant asserts that the land is also of much value, because of its susceptibility to reforestation. Complainant files a bill for partition of this land by metes and bounds, and, a demurrer to the bill having been sustained, he has appealed.

The will of the testator plainly shows an intention that his property should go into the possession and control of trustees and be by them kept together and managed for from 6 to 12 years, with a view to realizing the most possible out of it, and distributing it, during which time none of the beneficiaries should have the right of entry

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and occupancy. Further, that the trustees should have full rights of management, mortgage, sale, and conversion into other property in the business which he directed that they carry on. If the trust is a valid one in other respects, and the estate in the trustees a mere estate for years, on "term" as counsel call it—which we do not decide—or if the authority to sell and convey land, etc., is a mere power, the partition of the premises at the suit of a beneficiary is inconsistent with the provisions of the will and the purpose of the testator, and that is enough to require the denial of the prayer of the bill, whatever we may think of the nature of estates created by the will and the rights of partition, as applied to other cases.

See Freeman on Cotenancy & Partition, § 439:

"There are many instances in which the right to partition must be denied because the property has been charged with some trust, or dedicated to some purpose which would be defeated or impaired by the division of such property. Thus property may be devised to executors in such a manner as to show that the testator intended them to keep it undivided or to sell it after a stated time and use the proceeds for the benefit of certain designated persons. In these cases the right to partition is necessarily suspended, for it will not be granted in contravention of the will, where its purposes are not forbidden by law or public policy. And, generally, whenever property is vested in trustees, with a power of sale, or any discretionary power, and there are several beneficiaries, none of the latter have a right to treat the trust as terminated and compel a partition of the property. Such partition can be accomplished only by the unanimous assent of the beneficiaries, and we suppose not even with such assent, if the partition would clearly frustrate the objects sought by the creator of the trust."

Again, it is said in 30 Cyc. p. 185, and note:

"It may be stated as a general rule that, whenever an estate is subject to a valid trust, the purpose of which would be defeated by its partition, then all applications for the partition of the trust property must be denied. There may, although there is no direction for the sale of property, be a valid prohibition of its partition, either ex-

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press or implied, in a will or other instrument, creating the cotenancy, although no trust is created. Where, however, a trust is created, by the terms of which the division of the property is postponed to some future date, or where, although there is no express direction for such postponement, the objects of the trust must be made impossible or difficult of accomplishment by a partition, such partition, if applied for, must be denied. Where the trust is merely to secure the payment of loans or other debts, a partition is not subversive of it, and need not be denied."

See, also, 30 Cyc. p. 186:

"The exclusion of the right to partition, whether contained in a will or a conveyance, may be implied as well as express, and is implied by any valid direction for the use or disposition of the property which must be thwarted if a partition is permitted."

Numerous authorities are cited.

The case of *Palms* v. *Palms*, 68 Mich. 355, 378 *et seq.* (36 N. W. 419), seems to be consistent with this rule, although that decision is made to rest on the statute. It is held in that case that:

"The trusts contained in this will are express as well as active trusts, and, in so far as they are valid, vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust; and the persons for whose benefits the trust was created take no estate or interests in the lands, but they may enforce the performance of the trust in equity. How. Stat. § 5578. By another section of the statute it is provided that no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest."

The provisions of that will are in many respects similar to the will in this case.

It may properly be inferred that it is our opinion that the authority of the trustees is neither limited nor so changed, at the end of the period of six years, as to terminate the trust, or justify partition. Counsel have contended that this will does not create a valid trust, yet he says in his bill and brief:

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"Your orator does not contest the validity of said trust or any provisions of the will of the said David Ward, but respectfully insists and submits that, upon a true interpretation thereof, the said timber lands are subject to division and partition among said children and grandchildren."

We think that this estops him from claiming that no trust was created. We are of the opinion, however, that the provisions are clearly for the beneficial interest of the beneficiaries, and that the trust is fully expressed and clearly defined, and that the estate taken by the trustees is inconsistent with a present right of partition between the heirs, in view of the requirements of the will and the proper performance of the trust reposed in them.

Counsel for complainant rests his claim to partition on section 11015, 3 Comp. Laws, which provides:

"Such suit may be maintained by any person who has an estate in possession in the lands, of which partition is sought, but not by one who has only an estate therein in remainder or reversion. Such suit may also be maintained by any person who has an estate in possession in any ores, minerals or metals that may exist or be thereafter discovered in such lands and such last mentioned suit shall be brought only against such persons as may have an estate in possession in such ores, mineral or metals."

We understand that he does not claim that partition can be had, if inconsistent with the powers or trust conferred, but maintains that it need not be. As already appears, we think otherwise, and that the statute has not abrogated the rule above stated.

We have been much interested in the learned discussion of counsel in this case; but we are of the opinion that the reasons given above are an insuperable obstacle to the relief sought, and that a discussion of other questions, not necessary to a decision, should be deferred until they shall become crucial in some case.

The decree is affirmed, with costs of both courts.

BIRD, C. J., and OSTRANDER, MOORE, and STONE, JJ., concurred.

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WILSON v. HUGUS.

APPEAL AND ERROR — SAVING QUESTIONS FOR REVIEW — TRIAL BY COURT — FINDINGS OF FACT AND LAW.

In an action of ejectment tried by the court without a jury, requests for findings of fact and law, and exceptions to the conclusions reached, are necessary to a review of the errors assigned, although the judge renders an oral decision and opinion on the trial relating to the questions involved. Circuit Court Rule 26.

Error to Genesee; Wisner, J. Submitted October 25, 1910. (Docket No. 108.) Decided December 7, 1910.

Ejectment by Samuel J. Wilson against Joel Hugus, John Riddle, and Charles Sauble. A judgment for plaintiff is reviewed by defendants on writ of error. Affirmed.

Brown & Farley, for appellants.

McFarlan & Wilson, for appellee.

MOORE, J. This is an action in ejectment. The plaintiff claims to be the owner of the record title to the land in controversy. The defendants are in possession, claiming title by virtue of certain tax deeds. Before beginning the ejectment suit, plaintiff made a tender to the defendants of the amount paid upon their tax purchases, 100 per cent., and $5, and also enough to reimburse them for the taxes upon the property paid by them, with legal interest, a total of $160. The case was tried before the court without a jury. When the judge announced his decision, the following occurred:

"*The Court:* Now, there is a question of tender in the case. Has that tender been kept good?

"*Mr. Wilson:* It was not tendered into court. Under the law you are not obliged to tender before beginning in ejectment, but you are on the chancery side, but we will

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consent the court may make it a part of the order that the tender shall be kept good.

"*The Court:* Very well, then, it will be so ordered."

The case is brought here by writ of error.

There are seven assignments of error. There are insuperable difficulties about considering them. No request was made of the circuit judge for findings of fact or conclusions of law. After the arguments of counsel, the court at once expressed his views generally and his conclusion about what ought to be done. No exceptions were taken to the conclusions announced.

The record as presented does not comply in any essential with Circuit Court Rule 26. See *McDonell* v. *Union Trust Co.*, 139 Mich. 386 (102 N. W. 953), and the many cases cited therein; *Sparling* v. *Smeltzer*, 140 Mich. 461 (103 N. W. 1131); *Nichol* v. *Ward*, 156 Mich. 136 (120 N. W. 569).

Judgment is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

SAGER *v.* HARTSHORN.

1. MORTGAGES—PAYMENT—BURDEN OF PROOF.
   The complainant, in a suit to determine the amount due on a mortgage held by defendant, has the burden of proving payments which he avers.

2. SAME—ACCOUNTING.
   Held that the weight of the testimony was strongly against complainant's claim that he had made payments which defendant omitted to indorse on the mortgage note.

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Appeal from Shiawassee; Miner, J. Submitted October 26, 1910. (Docket No. 123.) Decided December 7, 1910.

Bill by Charles W. Sager against Fred E. Hartshorn to determine the amount due on a certain mortgage, and to require defendant to indorse thereon certain alleged payments. From a decree granting a part of the relief prayed for, defendant appeals. Reversed, and decree for defendant entered.

Odell Chapman, for complainant.

Albert L. Chandler and *George E. Pardee*, for defendant.

MOORE, J. The bill of complaint states, in substance, that complainant and his wife gave a mortgage April 21, 1899, to John Sell for $1,100 on certain real estate owned by them; that complainant has made payments thereon until the mortgage has been reduced to about $750, while the defendant, the present owner, claims there is over $1,100 unpaid. Other statements in the bill of complaint are as follows:

"As your orator is an old man, liable to depart this life at any time, he greatly fears unless he is able to have a proper indorsement made upon said note and mortgage that he may die before the same is fully paid and all such payments as have heretofore been made by him as are not indorsed on his said note and mortgage and for which he does not hold receipts will be lost. And your orator says there are several payments for which he does not hold receipts and which are not indorsed on said mortgage. * * * Your orator further prays * * * that the said defendant may come to an accounting and ascertainment of how much is still due upon said mortgage, and that he may, by an order of this court, be compelled to indorse on the said note and mortgage all sums of money which have either been paid to him or his predecessors in ownership of said mortgage, and that the defendant may be permitted to pay the honest and correct balance found by this honorable court to be justly due from complainant to de-

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fendant, and that your said orator may have such other, farther, different, and more complete relief as to this honorable court shall be deemed just and in accordance with equity and good conscience."

The defendant answered, setting out his version of the situation. A demurrer clause was contained in the answer. A hearing was had, and the court decreed that defendant had made a payment of $85.88 on October 29, 1900, and one of $90, April 26, 1907, for which he should be credited on the note. The defendant has appealed from that decree. Complainant has not appealed.

The questions involved are questions of fact. It was an advantage doubtless for the trial court to see the witnesses, but we are bound to try the case *de novo*, having in mind the rule that, as the complainant is averring payments, the burden is upon him to show that he made them.

The record discloses that, after Mr. Sell died, Mr. Bachman, who was a relative of the Sells, had charge of his estate; that Mrs. Sell, the widow, made her home with them for a time; that the mortgage came to Mrs. Sell by reason of the will of her husband. Mrs. Sell sold the mortgage in January, 1908, to Mr. McKenzie, who about one month later sold it to defendant. The bill of complaint was filed in this case October 16, 1909.

The note accompanying the mortgage reads as follows:

"$1100. MORRICE, MICH., April 21, 1899.

"Eleven years after date, for value received, we promise to pay to the order of John Sell, the sum of eleven hundred dollars with interest thereon at the rate of six per cent. per annum, payable annually, to wit, on the 21st day of April in each year until this note is fully paid, with the privilege of paying one hundred dollars or more at the end of each year when the interest becomes due and payable according to the tenor of a certain mortgage bearing even date herewith, executed by Charles W. and Cornelia L. Sager, to said John Sell, which mortgage is collateral hereto.

"CHARLES W. SAGER.
"CORNELIA L. SAGER."

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Indorsements:

"August 14, 1899, received on the within note $50. January 20, 1900, received on the within note, $50. November 22, 1900, received on the within note $100.98. November 12, 1901, received on the within note $45. October 16, 1902, received $100. October 2d, received, $100, 1904; February 21, 1907, received $50. Notice protest waived. W. E. McKenzie. April 4, '08, Cash $66. Interest in full to April 21, '08. $66 paid as interest to April 21, '09. $66 paid April 23, '10, interest to April 21, 1910."

Mr. Sager produced upon the trial a receipt purporting to be signed by Hannah Sell, dated October 28, 1900, for $85.88. It will be observed that the note does not bear any indorsement of a payment made that date. It is the testimony of Mr. Bachman that complainant made this payment and at the same time the complainant had sold Mr. Bachman some crates which he manufactured, the exact amount of which they did not at that time know; that later it was learned they amounted to $15.10, which amount Mr. Bachman paid to Mrs. Sell, together with the $85.88, and indorsed on the note November 22, 1900, a payment for $100.98, which amount was made up from $15.10 for crates and the $85.88 complainant had paid in cash. Mr. Bachman's testimony is very strongly corroborated by the testimony of Mrs. Dewey:

"*A.* Mrs. Sell came down to visit me in June, 1907, and she stayed some time. She had her papers with her. They remained there and in the safety deposit vault in the bank until Mr. McKenzie purchased them.

"*Q.* Did Mr. Sager come to see you with reference to the papers?

"*A.* He came down, and I told him to bring his papers down and we would go over them; whatever we owed him, that he hadn't credit for, we would settle for.

"*Q.* What reply did he make to that, if you remember?

"*A.* Why, he said he had some with him, and he showed me this $85 receipt, and I showed him on his note and recalled the circumstance about it, and he said it was the same.

"*Q.* What payment was that, do you remember?

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"*A.* It was the payment in November; it is credited in November, I think, the 22d, of $100.98.

"*Q.* Did you and he talk it over about the $85.88?

"*A.* We did, and I recalled the circumstance to him; he remembered about it; he remembered about the horse running away and his delivering the crates later."

The cross-examination of the complainant indicates the improbability of his having money to make a payment of $85.88, October 28, 1900, and a payment in excess of $100 less than a month later. There is other testimony bearing upon that payment which we will refer to later.

As to the $90 item: It is the claim of complainant that in April, 1907, he went to the house of Mr. Bachman and found Mrs. Sell alone and paid to her the sum of $100, and she agreed that when Mr. Bachman returned she would send him a receipt for the amount; that a few days later a receipt was brought to him by a little girl; that he put the receipt away and later found it was a receipt for $10, instead of for $100. In testifying about this transaction, he said, among other things:

"*Q.* What was done, if any time, as to giving or sending to you a receipt?

"*A.* A day or two afterwards, I got a receipt. A little girl brought one to the road. I was going by Mr.—Oh, well, the man that lives on Bachman's farm there, Ed. Elker, I was going by their house. A little girl comes out. She says, 'Here is a paper Mr. Bachman sent over to you.' I took it and looked at it. I had no glasses or nothing. I looked at it. I see it was a receipt.

"*Q.* Said Mr. Bachman sent it to you?

"*A.* Yes, Mr. Bachman. I looked at it. It looked as if it was $100 indorsed. I said that it was a receipt for $100, I guess. I doubled it up, and put it in my pocket. When I got home, I put it in my drawer where I keep my papers.

"*Q.* Did you have glasses with you at that time?

"*A.* No, sir; and I supposed it was $100.

"*Q.* When was the first time that you again looked at that receipt?

"*A.* A spell after that, I had a dream, I dreamed one night Mrs. Sell was cheating me out of that hundred dollars and it worried me.

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"*Q.* Don't tell us what you dreamed. Tell us when was the next time you saw that receipt is what I asked you.

"*A.* That next morning I went and looked at the receipt and see what it was; I looked and I says it is only $10 instead of $100.

"*Q.* You mean the next morning after your dream?

"*A.* Yes. * * *

"*Q.* Was that before or after McKenzie got the mortgage?

"*A.* No, that was after. Mr. McKenzie had the mortgage then.

"*Q.* It was after he owned it?

"*A.* Yes."

It will be remembered Mr. McKenzie bought the mortgage in January, 1908. On the cross-examination he testified that he made Mrs. Sell personally only one payment of $100, Mrs. Bachman testified that complainant came to her house when Mr. Bachman was away and paid Mrs. Sell $100, that when Mr. Bachman came home he was informed of the transaction, and Mr. Bachman testifies he sent Mr. Sager a receipt and indorsed the amount on the note, and that it is the indorsement of October 2, 1904. It is the testimony of both Mr. and Mrs. Bachman that in April, 1907, on account of her advanced age, Mrs. Sell was never left alone for more than a few minutes at a time. Mr. Bachman testified that the $10 payment was made to him by the complainant, who furnished him a piece of paper upon which he wrote a receipt for $10 and delivered it to the complainant; that it was not indorsed on the note because the note was not at that time accessible to him. Near the close of the case, the complainant, in response to his counsel, gave the following testimony:

"*Q.* What had been the relations between you and Mrs. Sell up to January, 1908? Had there been any trouble between you?

"*A.* Nothing very special. I built a house for them and a barn by the job, furnished the material for the house and built it, and then done the work on the barn for them, and they took out about $230 out of my bill; said I didn't

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nail the shingles good on the roof, and so on. That was long before I borrowed the money.

"*Q.* Since the death of John Sell, and since you borrowed his money, has there been any difficulty between you and Mrs. Sell up to January, 1908?

"*A.* Not any particular, only I didn't feel very good, taking $230 out of me."

The testimony of Mr. McKenzie is that before he bought the mortgage he called complainant up by phone and asked him to call upon him and ascertain how much was unpaid; that the complainant called upon him; that neither of them had the note to see the indorsements, but Mr. McKenzie was to get them.

"If I would get those and send them, he would have the teacher figure it over for us.

"*Q.* What did you do then, if anything, with reference to getting the figures and sending them?

"*A.* I went to Mrs. Dewey and got the note, and I think I copied it myself, I am not just sure, but I think I did; if I didn't she gave them to me, * * * and I mailed him a copy of the dates.

"*Q.* Did you see this paper that was there?

"*A.* Yes, sir.

"*Q.* What would you think as to that being the one?

"*A.* That is the one. I made that out myself, and I made a copy of it, which I have somewhere in my office, but I didn't have time to find it this morning.

"*Q.* After you sent him that paper, how long was it before you saw him again?

"*A.* He came down I should think perhaps a week, I should judge. I don't just remember the exact time, but somewhere along there. It wasn't long, because I was in a hurry to get this matter closed up, and he brought the figures of the teacher and said he had figured it over, or the teacher had, and so we compared notes.

"*Q.* You and Mr. Sager?

"*A.* Yes. There was at that time * * * when I was buying the mortgage about $1,150 due, but, when I figured it over, I figured it so as to make it even years and figured it ahead to April 21st, and that is the way the statement comes there because that was the time he was going to pay the interest or about that time, so of course that is the way it figures about $1,170, but it is very

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nearly $1,150. Well, when we came to figure it, he says the teacher makes it so much, told the number of figures, it was something like 10 or 15 dollars more than I had made it, and I looked the teacher's figures over. * * * Almost the first item was a mistake of $10 in subtraction. That was in Mr. Sager's favor, and I called his attention to it. I said there is a mistake right there and showed him the figure; that would make his figures more than mine, and it was a mistake of $10 in his favor. I called his attention to it. I said, 'I don't want to figure this way any more than it is because I am paying for it, and I don't want to pay only what is on it, and I don't want you to pay any more.' So I said there is no use of looking over the teacher's figures farther because they would be changed all the way through; that $10 would make a big difference in the total amount anyhow. Mr. Sager spoke up when I showed him the $10, 'I think probably your figures are about correct.' He went out, and he said, 'When the interest is due, I will pay you.' I said: 'I am away a good deal. If I am not in the office, you can leave it at the bank, in the Citizens' Bank.' It ran along quite awhile, and during this time I thought I had sold the mortgage to Mr. Hartshorn before the interest was due, but I retained the interest and kept that out. I called Mr. Sager up by phone. He says, 'I left that interest at the bank.'"

Mr. McKenzie had some trouble in finding the interest, as Mr. Sager had left it for him in the wrong bank. Mr. Sager had in his possession at the trial the paper Mr. McKenzie had furnished him. It is a very significant fact that the amount Mr. Sager left at the bank to pay the interest was the sum of $66, 6 per cent. on $1,100, and that a like amount was paid by him the following year. Mr. Sager was upwards of 80 years old when he was testifying. We have already mentioned some strange things in his testimony. It is apparent he was forgetful, and we think the testimony is strongly against the theory that either of the payments were made.

The decree is reversed, with costs to defendant, and one may be entered here in accordance with this opinion.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

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FARMERS' & MECHANICS' BANK *v.* CLANCY.

BANKS AND BANKING—BILLS AND NOTES—COMPROMISE—AUTHORITY OF CASHIER—PRINCIPAL AND AGENT.

In an action upon a promissory note that the defendant claimed had been compromised by an agreement of plaintiff bank, through its cashier, to accept certain bonds in part payment, where the evidence showed that no direct authority was conferred by the board of directors upon the cashier to accept anything but cash in payment of obligations, and that the discount committee met frequently; that the officers of the bank were diligent, and no special authority could be implied from the course of dealing between the bank and its cashier, the court should have determined on the trial, as a matter of law, that the cashier had no authority to make the compromise.

Error to Washtenaw; Kinne, J. Submitted October 27, 1910. (Docket No. 140.) Decided December 7, 1910.

Assumpsit by the Farmers' & Mechanics' Bank against William J. Clancy on a promissory note. Judgment for defendant. Plaintiff brings error. Reversed.

A. J. Sawyer & Son, for appellant.

Arthur Brown and *M. J. Cavanaugh* (*E. R. Sutherland*, of counsel), for appellee.

MOORE, J. This suit was commenced to recover the amount due on a note given to the Farmers' & Mechanics' Bank for $4,378.75, bearing date April 27, 1903, payable six months after date, without grace, with interest at 5½ per cent., signed by the Ann Arbor Brewing Company, by Ernest Rehberg, president, William J. Clancy, secretary, and Herman Hardinghaus, and indorsed by the same persons. The note recites that there were deposited and pledged with the Farmers' & Mechanics' Bank, as

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collateral security for the payment of this note, and any other indebtedness due or to become due to the bank, certain bonds and stock.

At the time of giving the note in suit the Ann Arbor Brewing Company was further indebted to the plaintiff bank upon two notes for $1,000 each, signed by the Ann Arbor Brewing Company, indorsed by Clancy, Rehberg, and Hardinghaus, also one note for $1,000, signed by the Ann Arbor Brewing Company and indorsed by Clancy and Rehberg, also one note for $500, signed by the Ann Arbor Brewing Company, and indorsed by Rehberg and Hardinghaus. On the 4th day of December, 1903, plaintiff's bank began three suits, one against the Ann Arbor Brewing Company, William J. Clancy, and Ernest Rehberg, to recover upon the two notes of $1,000 each, indorsed by Clancy and Rehberg, one upon said $1,000 note signed by the Ann Arbor Brewing Company and indorsed by Clancy and Hardinghaus, and one against Rehberg and Hardinghaus on the $500 note signed by the Ann Arbor Brewing Company, and indorsed by Hardinghaus and Rehberg. The defendants appeared in each of said cases, pleaded the general issue, and on the 26th day of December, 1903, judgment was rendered in all three of the cases for the amount of the notes, interest, and costs respectively.

The defendant pleaded the general issue, and gave notice of a defense which is stated in the brief of counsel as follows:

"Defendant was to confess judgment on the three one thousand dollar notes for himself and secure confession on behalf of the Ann Arbor Brewing Co.; he was to pay the judgment rendered upon the note indorsed by himself and Hardinghaus; the bank was to take out execution against the Brewing Co. on the two one thousand dollar notes indorsed by defendant and Rehberg and levy upon its property, and defendant was to bid it in, was to pay all the costs of the suits and the levy, and hold the bank harmless in regard to the whole matter, including the fees of the bank's attorney, Mr. Norris; and defendant was to re-

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lease the bank from all liability to him by reason of its unauthorized release of $2,000 worth of the collateral deposited with the note in suit. In consideration of these acts on the part of defendant, the bank agreed to accept the $4,000 of bonds still held as collateral to the note in suit as payment on said note, *pro tanto*, and release defendant from liability for the rest of the note."

The case was tried before a jury, which returned a verdict in favor of defendant. The case is brought here by writ of error.

It is apparently conceded that as to the question of whether a contract was made as the defendant and his attorney swear positively it was made, while the cashier of the bank and its attorney swear as positively that no such contract was made, that this would, under proper conditions, present a question of fact to be passed upon under proper instructions. But it is contended by appellant (we quote from the brief):

"The plaintiff claims, that conceding the claimed contract to be as set up in the plea and shown by the testimony:

"(1) That neither Mr. Belser, as cashier, nor Mr. Norris, attorney for the bank in the three suits mentioned, had any authority or power to make a contract of the character and kind mentioned in the testimony, and therefore the bank was not bound by any such contract, if one was made as claimed.

"(2) That if such a contract was made as claimed by the defendant, there was no consideration for the contract, and it was, therefore, void.

"(3) The rulings and decisions of the court in receiving and rejecting testimony and remarks of the court made in the presence of the jury were erroneous.

"(4) The failure and refusal of the court to rule upon objections was erroneous.

"(5) The remarks of counsel made in the presence of the jury were erroneous."

Whatever may have been the attitude of counsel in the court below, they apparently agree in this court as to the law of the case. We quote from the brief of counsel for appellant:

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"A cashier of a bank has no legal authority by virtue of his position to compromise a claim of the bank, or to execute a composition agreement and release therefor. Such a power is discretionary, calling oftentimes for the exercise of considerable reflection, and a high decree of judgment. It is strictly a sacrifice, at least of nominal property of the bank, and is a function of the board of directors, and not of an executive officer. Magee on Banks & Banking, p. 178 (bottom); *Chemical Nat. Bank* v. *Kohner*, 58 How. Prac. (N. Y.) 267; *Bank of Commerce* v. *Hart*, 37 Neb. 197 (55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479); *North Star, etc., Shoe Co.* v. *Stebbins*, 2 S. D. 74 (48 N. W. 853, 834); 2 Comp. Laws, § 6093, subd. 7. The extent of the general powers of a cashier of a bank is a question of law, and not of fact. *Farmers' & Mechanics' Bank* v. *Troy City Bank*, 1 Doug. (Mich.) 457; *Peninsular Bank* v. *Hanmer*, 14 Mich. 208. And a charge is erroneous which refers it to the jury to determine whether a cashier as such has power to accept stock and bonds in payment of notes of the bank. 1 Doug. (Mich.) *supra*."

Counsel then proceed to quote at length from the cases cited.

In relation to the proposition of counsel for plaintiff the counsel for defendant reply as follows:

"Appellant argues that Mr. Belser, as cashier, had no authority to make a contract of the character mentioned in the testimony. At the head of its discussion of this point it places the caption, 'Cashier's Powers,' and quotes from Magee on Banks and Banking in respect to the authority which the cashier of a bank possesses by virtue of his office. Now, we do not claim that a cashier as such, and solely by virtue of his office, would have authority to make that agreement which the jury have found was made in this case. The case was not tried on that theory, nor was the jury instructed upon that theory. Appellant says that the power to release an indorser or compromise a claim is not within the power which a cashier possesses by virtue of his position; that the extent of the general powers of a cashier of a bank is a question of law, and not of fact; and that a charge is erroneous which refers it to a jury to determine whether a cashier as such has power to accept stock and bonds in payment of the notes of the

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bank. We admit all this. * * * If the testimony had merely shown that Mr. Belser was cashier of plaintiff bank, and it had been contended that upon such a showing as the jury should say whether or not the bank was bound by the compromise agreement, appellant's argument would have been sound, and its authorities would doubtless have sufficed to demonstrate that the bank was not bound. But the defendant did not show merely that Mr. Belser was cashier. He did not claim that a cashier as such was authorized to compromise a debt. What he did show was that Mr. Belser was intrusted with the entire management of the bank. He might have been the bank's president, or vice president, or assistant cashier, or merely a director. The position he occupied is unimportant, for no argument as to his authority is drawn from his position. Defendant did not claim that because Mr. Belser was cashier he could bind the bank. He claimed that Mr. Belser could bind the bank because he was intrusted by the board of directors with the bank's management and had been so intrusted for twenty years. In other words, the case was tried upon a wholly different theory from that which appellant now seeks to inject into it. It was tried upon the theory that the cashier, by the long continued and well understood practice of the board of directors, was authorized by the board to do all acts which could be done by the board itself and which it could lawfully authorize a cashier to do. The principle according to which this case was tried was that stated by this court in *Davenport* v. *Stone*, 104 Mich. 521 (62 N. W. 722, 53 Am. St. Rep. 467), where the court says:

"'The directors intrusted the entire management of the bank to the cashier, Mr. Bradley. Therefore, neither the bank nor its receiver can now be heard to deny the authority of the cashier to do any of those acts which it or its directors might lawfully authorize the cashier to do.'

"The rule is stated by Mr. Morse as follows:

"'If the directors have for many years allowed the cashier to do, without interference, all the business of the bank, they are held thereby to have conferred upon him authority to do anything and everything on the corporate behalf which the charter or law does not absolutely prohibit and forbid a cashier to do, and so render illegal under all circumstances.' 1 Morse on Banks and Banking, § 165.

"* * * In the case of *Wing* v. *Bank*, 103 Mich. 576

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(61 N. W. 1009), this court announced the same rule, and that case was before the trial judge when he charged the jury. In fact he quoted from the opinion of this court in that case in the course of his charge, and this action of the trial judge is assailed by appellant as erroneous. The language of the decision is given at length in appellant's brief and need not be repeated here."

As tending to support this contention counsel cite a portion of the cashier's testimony as follows:

"*Q.* And as a matter of fact the board of directors of your bank never went back on a single thing that you did, they ratified everything that you did as cashier of that bank when you were left there as managing officer in the absence of the others, you cannot now name one thing they refused to ratify, can you?

"*A.* I don't know as I can.

"*Q.* And as a matter of fact they did not. Fred H. Belser as cashier and managing officer of that bank transacted without the aid of any one else at least 50 per cent. of the bank's business?

"*A.* I don't know as to that, probably I did most of it.

"*Q.* And as a matter of fact they ratified everything you did, and that was the understanding, was it?

"*A.* Not necessarily, no.

"*Q.* But you did it?

"*A.* Once in a while I did something they did not agree with although they ratified it and cleaned those things up.

"*Q.* And in the absence of the discount committee of that bank or board of directors you did the business for that bank and everything you did for 20 years was ratified, is not that so?

"*A.* I think so."

Counsel then proceed to argue:

"Mr. Belser, throughout his entire testimony, made every effort to show that he had no authority to make the agreement alleged by Mr. Clancy. He was called by plaintiff for the purpose of proving want of authority in himself to bind the bank, and he declared repeatedly that he had no authority to make any such agreement. The plaintiff's whole case rested upon its ability to show that Mr. Belser had no authority to make the contract. And yet in the face of all this—against his own interest as a stockholder and against the interest of his bank—he ad-

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mitted on cross-examination that for 20 years he was managing officer of the bank, and did most of the bank's business, that during those 20 years there was not one instance which he could recall where the board of directors had failed to ratify his acts, and that although they once in awhile disagreed with him they nevertheless ratified everything he did during those 20 years. It would be difficult to conceive of stronger testimony than this from a hostile and reluctant witness."

The trouble with this argument is that it is based upon a few statements of the witness which do not correctly represent what he testified to. Prior to giving the testimony quoted, the cashier not only denied the making of the contract, but testified as follows:

"*Q.* Did you yourself have authority to make any such contract as cashier?

"*Mr. Brown:* We object, it is incompetent.

"*Mr. Sawyer:* A question of agency has arisen; we claim he did not have any authority to make such a contract without the action of the board of directors, and if he did it it was beyond the scope of his authority.

"*The Court:* You may ask whether he had any special authority in this matter.

"*Q.* Did you have any special authority from the bank to make such an arrangement as it is claimed you did make?

"*A.* No, sir.

"*Q.* Did the board of directors ever give you any authority to make such a contract as they claim you did make here?

"*A.* No, sir."

Again he testified:

"*Q.* I ask once more so there may be no mistake about it at all, Was it within the powers conferred upon you by your authority to receive in payment of any note due to the bank anything except money?

"*A.* I had no authority to receive anything else only money for settlements.

"*Q.* Was there ever any such practice as that in your bank?

"*A.* No.

"*Q.* When any settlement or adjustment of any claim

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was made or an offer brought there for settlement, what were you compelled to do about it?

"*A.* I submitted it to the board and they acted upon it.

"*Q.* Did you ever do it any other way?

"*A.* No.

"*Q.* In that connection I ask you whether or not you ever submitted to this board or to the officers of that bank any proposition made by Mr. Clancy with reference to the accepting of those bonds in payment of his note?

"*A.* Never."

He further testified:

"The discount committee changed from time to time. There are usually three on that committee. And they meet every day, as they happen to come in, usually in the morning.

"*Q.* Then if you have a meeting of the discount committee in the morning, business that comes in in the afternoon, who looks after that?

"*A.* Well, I look after it unless it goes over to the next day.

"*Q.* Then all the business that comes in in the afternoon after the discount committee has met is acted upon by the cashier, is it not?

"*A.* Yes, sometimes. And that was true all the while I was cashier. So far as I know that is the general practice of banks.

"*Q.* The cashier is the managing officer of the bank all the rest of the time, except when the board of directors or this committee are actually in session, the cashier has charge of the bank. Is that true?

"*A.* Yes. And that was true all the time that I was there.

"*Q.* And that was true during all the time that these negotiations were going on, is that so?

"*A.* Yes.

"*Q.* So that if Mr. Clancy came to you in the afternoon, after the discount committee met in the morning, for a loan of say $5,000, that would have been considered a large loan, and in the morning you would have felt it incumbent upon you to submit it to the discount committee?

"*A.* I often telephoned to the members.

"*Q.* If it came in after the meeting of the discount com-

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mittee, and it was no trouble to the customer to wait until the board passed upon it for a loan of that size?

"*A.* Yes.

"*Q.* If it came in the afternoon you would act upon it yourself?

"*A.* Unless I could telephone to the separate members.

"*Q.* Do you mean to say you ever telephoned to the discount committee or talked with them about any loan you made to Mr. Clancy?

"*A.* Yes, sir."

He further testified:

"*Q.* What part—what fractional part—would you say of the discounts that are made, that were made from day to day during all the time that you were cashier of that bank actually passed to the discount committee of the directors before the customer had the accommodation asked for?

"*A.* Well, the majority of them.

"*Q.* A majority of them, what do you mean by that, 60 per cent?

"*A* No, there is—

"*Q.* Do you mean to say that fully 60 per cent. of your discounts were passed upon? I mean the items, not the total amount of money, but 60 per cent. of the items that make up the day's business, do you mean to say that a majority of 60 per cent. of that has been passed upon by your discount committee before the customer receives the accommodation?

"*A.* Let me explain. The bank has a line of customers—a regular line of customers. Their line of credit is fixed. I was authorized to loan every man a certain amount of money, not to exceed a certain amount of money that the board passed upon. For instance, if Mr. Brown came in there, his line of credit was fixed. We could loan him as high as $3,000. He would get up to that. I had no more right to loan. I had to stop and get the consent of the board or discount committee. Fully 50, 60, 70 per cent. of the paper that came in daily was that kind of paper, that was fixed.

"*Q.* You never spoke about it to the directors at all?

"*A.* They simply approved it when they came in. I put it on the book before they met, and I transacted the business before or after their meeting, and that made no difference. That was customary all the while I was

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there. Whenever a customer came into the bank, after the discount committee had met for that day, and wanted accommodation I passed upon it, and waited until the next day for the board to O. K. it. And I presume that has been the custom of the bank all the time."

He further testified:

"We had in our bank what is known as a discount committee.

"*Q.* And that discount committee meets how often?

"*A.* The rules of the discount committee were as follows: Every Monday morning the discount committee is to meet with the full committee, and all of the papers that were coming due in the week following were examined and the discounts were passed upon if they were asking for renewals, if they were not asking for that and wanted to pay them they were so marked on the memorandum and I would notify them we wanted the note paid, otherwise, the note would be renewed, and anything I had of importance in the shape of a new note I submitted to them, and we discussed the line of credits; if anybody came in we fixed the line of credits for him.

"*Q.* What do you mean by 'line of credits?'

"*A.* Suppose a new man would come in and open an account, suppose that man wants to borrow some money, we would say we will let him have not to exceed a certain amount of money.

"*Q.* Inside that line of credit what authority had you?

"*A.* I had authority to make that credit to that man.

"*Q.* If you exceeded that amount?

"*A.* Then I went to the discount committee for instructions.

"*Q.* But if it was inside that line of credit you did not have to consult with the discount committee at all?

"*A.* No. Suppose a man was doing business with us, a man we knew, they would say, 'If that man wants $200 or $300 let him have it.' I never submitted that to the discount committee before, I did afterwards.

"*Q.* When it was within that line of credit you discounted it to him up to the limit of that line without consulting the discount committee at all, you had that power?

"*A.* That was the arrangement we ran on.

"*Q.* I say that was the authority they gave you, if one made an application for a loan exceeding the limit, then what?

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"*A.* Then I went to the discount committee and they passed upon it before it was made."

After all this testimony, came the testimony on cross-examination which counsel for defendant have quoted as showing that the cashier was the manager of the bank. Immediately following this cross-examination the cashier testified as follows: Redirect examination:

"*Q.* Do you mean you had the right to exceed the limit fixed by the bank?

"*Mr. Brown:* I object; that is leading and suggestive.

"*Q.* Do you mean to say by your answer to Mr. Brown, that in the absence of any authority on the part of the bank for doing it, you had a right to make a settlement with Mr. Hardinghaus and take those bonds in payment of that debt without any action on the part of the bank officials on that subject?

"*Mr. Brown:* The same objection, it is leading and suggestive, and is cross-examination. (Which objection was then and there sustained by the court.)

"*The Court:* I think it is.

"*Q.* Now, Mr. Belser, I want to know whether or not your authority to make a settlement like that of the acceptance of the bonds on the behalf of Mr. Hardinghaus was ever granted to you by the bank.

"*A.* I had this whole matter talked over before the board, the settlement of Hardinghaus and everything was understood before it was ever made. I had no authority to settle without the consent of the board, but they acted upon those things.

"*Q.* That is what I expected you to say and wondered why you did not say it before.

"*A.* I made a general statement that I never made any settlement or did any business; of course I did those things.

"*Q.* You did those things within what limit?

"*A.* But a settlement of this kind I would always consult them about and the discount committee specially."

All this testimony was uncontradicted unless it may be said that such is the result of the cross-examination.

At this point it may be well to refer to the cases, relied upon by the defendant, of *Wing* v. *Savings Bank*, 103 Mich. 565 (61 N. W. 1009), and *Davenport* v. *Stone*, 104

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Mich. 521 (62 N. W. 722, 53 Am. St. Rep. 467). In the first of these cases Justice MCGRATH, speaking for the court, said:

"It is not claimed that any of the other directors or officers of the defendant bank had any actual knowledge of these transactions or took any part in them. Fuller and his relatives and personal friends, all of them nonresidents of Ludington, owned a majority of the stock of defendant bank; and Fuller, as he often boasted, was the sole manager, and could do anything he pleased in relation to the management of the bank. He openly asserted this on different occasions, and his course of conduct lent all possible color to the claim. He advanced the money of the bank to build a clubhouse in the city of Ludington. He took stock in manufacturing companies, and did other extraordinary things for the cashier of a bank to do, without any protest on the part of the resident directors of the bank. The directorate was made up of men totally unacquainted with banking, men engrossed in other affairs, and who had neither time nor inclination to look after the affairs of the bank. They voluntarily left all matters to the discretion of Fuller; seldom held meetings of the directors. * * * It does not appear whether the directors had actually voted to confer unusual powers upon Fuller, but it does appear that he claimed and exercised them without let or hindrance on all occasions. He was by sufferance, if by no other authority, something more than a cashier; he was the manager of the bank."

In *Davenport* v. *Stone*, *supra*, Justice GRANT, speaking for the court, said:

"Mr. Bradley, the cashier, testified that for five years prior to the suspension of the bank he was its financial manager, and that the financial management of the bank was practically left to him by the board of directors. * * * The directors intrusted the entire management of the bank to the cashier, Mr. Bradley. Therefore, neither the bank nor its receiver can now be heard to deny the authority of the cashier to do any of those acts which it or its directors might lawfully authorize the cashier to do."

It is apparent from these quotations that the two cases are as unlike the case at bar as it is possible for cases to be. In the case before us the officers of the bank were

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diligent. The bank had a discount committee which met almost daily and was at all times accessible to the cashier. A careful reading of every word of the somewhat voluminous record in this case fails to show that unusual powers were conferred upon the cashier. There is no competent testimony in the case from which it can fairly be inferred that authority, either direct or implied, or by the course of business, was conferred upon the cashier to make the contract which it is claimed he made, and which he says he never made. The court instead of submitting the case to the jury should have given plaintiff's first request to charge, directing a verdict for plaintiff. It is not necessary to discuss the other assignments of error.

Judgment is reversed, and new trial granted.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

CHEYNEY *v.* CHEYNEY.

1. JUDGMENT—DIVORCE—SERVICE—OPENING DEFAULT—DECREE—EQUITY.

   A decree for divorce obtained on substituted service, set aside on affidavit of the defendant and on an order opening his default and permitting him to file an answer, after the filing of which complainant dismissed her bill, is not a valid, subsisting decree for divorce.

2. DIVORCE—EXTREME CRUELTY.

   Held that evidence offered by complainant against the defendant, her husband, in proceedings for divorce, did not warrant a decree on the ground of extreme cruelty.

Appeal from Wayne; Donovan, J. Submitted October 27, 1910. (Docket No. 132.) Decided December 7, 1910.

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Bill by Elmira W. Cheyney against John Passmore Cheyney for divorce. From a decree dismissing the bill, complainant appeals. Affirmed.

James H. Pound, for complainant.

Stellwagen & MacKay, for defendant.

MOORE, J. This is a proceeding brought to obtain a decree of divorce upon the ground of extreme cruelty. Desertion is also charged. The court made a decree as follows:

"This cause was duly brought on to be heard upon the bill of complaint filed therein, the answer, and the plea to the jurisdiction of said defendant, and upon proofs taken in open court. And, the court being fully advised in the premises, and after hearing arguments by counsel for the respective parties, it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree, that the complainant's said bill of complaint be and the same is hereby dismissed without prejudice."

The case is brought here by appeal. The case is peculiar in many ways. We quote from the brief of the solicitor for the complainant:

"Complainant is in a peculiar situation, as shown by this record. After two proceedings in court, she does not know where she is legally. Whether she is married or not married; whether she is or can ever be a citizen of Michigan. She has had two trials or hearings where all legal rules seem to have been violated. She has been divorced and reinstated in her matrimonial state upon an *ex parte* showing, not by a petition for a rehearing or by a bill of review, and she has been turned out of court in the Wayne circuit court, in chancery."

It is urged by the solicitor for complainant that this court should hold, *first*, that the proceedings in Kent county resulted in a valid decree of divorce; or, *second*, if this cannot be done, that complainant in the subsequent proceeding in Wayne county made a case which entitles her to a decree of divorce. The testimony in the Wayne

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circuit court was taken at intervals, and in a somewhat informal way. In the record returned to this court appears the following:

"(Title of Court and Cause.) In signing the record in this case on *ex parte* appearence of Mr. Pound, solicitor for complainant, it was expressly understood that both the letters of the complainant now fully identified as a part of the evidence in the case, and a certified copy of the court proceedings at Grand Rapids in the divorce case recently granted and set aside between the same parties be made, and they are each made a part of the record in this cause now in process of appeal to the Supreme Court, and I certify that the same were considered in the decision which I made herein, and I further certify that, by agreement of counsel on the hearing of this cause, the letters hereinbefore mentioned and certified copies of the proceeding of the Kent county circuit court, in chancery, were in evidence, and were considered by me before the decision of this case.

"J. W. DONOVAN, Circuit Judge."

A careful reading of the record establishes the following state of facts: The parties were married in Philadelphia in 1885. The defendant was a traveling man, and is still a traveling man. The complainant usually accompanied him from town to town. For many years they spent a good deal of time in Detroit, making their headquarters at the Hotel Cadillac, and later at the Addison. They lived together until about the 1st of April, 1908. The business of the defendant called him to Ohio. The complainant preferred to remain in Detroit for a time, and it was agreed she should do so. The defendant paid her bill at the hotel until the 1st of May, and gave her a check for $100, it being the agreement that she would meet him at the Colonial Hotel in Cleveland about the 1st of May. Between the 6th of April, 1908, when defendant went to Ohio, and the 30th of the same month, plaintiff wrote him at least 14 kind and affectionate letters, the last one of which ended as follows:

"I will stop now. I won't write again from Detroit.

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I hate to give up these rooms, they are so bright and cheery. Love and kisses from Myra."

On the 30th of April the complainant wrote defendant from Buffalo a long letter of an entirely different character, giving him to understand she should not live with him, and making statements about herself which it is not necessary here to repeat. Instead of going to Ohio, she went to Grand Rapids and filed a bill of complaint for divorce, which was sworn to on the 2d day of July.

On the 3d day of July she made an affidavit in the cause to the effect that the defendant was not a resident of Michigan, but was a resident of Cleveland, Ohio. Based upon this affidavit an order was made for bringing in the defendant by publication, which order was published in the Caledonia News. Later upon an *ex parte* hearing a decree of divorce was granted to the complainant. As soon as defendant learned of this proceeding, he filed an affidavit in the Kent circuit court showing the situation from his viewpoint, and asking that the decree be set aside and for permission to file an answer in the case. The decree was set aside, and leave was given to file an answer. An answer was filed and served. From this order no appeal or other action was taken except that the complainant caused her bill of complaint to be dismissed in Kent county. The proceedings in Kent county being as we have stated, we think it very clear that complainant cannot now be heard to say that there is a valid decree of divorce.

After the proceeding in Kent county was discontinued by the complainant, this proceeding was commenced in Wayne county. Defendant answered, and denied in detail all the averments of the bill of complaint. He denied that complainant was a resident of the State, and that he was a resident of the State. He set out the proceedings in Kent county, and questioned the jurisdiction of the court. The complainant insists the Wayne county circuit court has jurisdiction to try the case, and that she has

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established upon the merits the case stated in her bill of complaint. Defendant denies both propositions.

We think it unnecessary to discuss the question of jurisdiction. The conduct of the complainant, as disclosed by her testimony and her letters, is utterly inconsistent with the claim stated in the bill of complaint. Without reciting the testimony, we think complainant failed to make a case.

The decree of the court below is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

WEADOCK *v.* SWART.

1. INNKEEPERS—NEGLIGENCE — LOSS OF PROPERTY — SUFFICIENCY OF LOCK—STATUTE.

   Under the statute limiting the liability of hotelkeepers for the loss of property of their guests (Act No. 42, Pub. Acts 1905), the question of the suitability of the lock on the door of plaintiff, who occupied a room with another, and whose watch and charm were stolen, while, as plaintiff claimed, the other guest was absent from the room, was for the jury, upon a record which showed there was only one key for the lock and the guest who left the room, did not lock the door.

2. SAME—GUEST AT HOTEL—WATCH AND CHAIN.

   A gold watch and chain in habitual use by a guest are not jewelry, or personal ornaments, or articles of gold and silver manufacture, within the intent of Act No. 42, Pub. Acts 1905, limiting the liability of innkeepers who maintain a safe or vault for the deposit of articles of the character described, when the guest shall not offer to deliver the articles for custody in the safe or vault.[1] Per MOORE, BIRD, and STONE, JJ.

[1] As to effect of statute limiting innkeeper's liability for goods not delivered into his custody, see note to *Brewer* v. *Caswell* (Ga.), 23 L. R. A. (N. S.) 1107.

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Error to Wayne; Donovan, J. Submitted October 28, 1910. (Docket No. 159.) Decided December 7, 1910.

Case by John C. Weadock against James H. Swart and William C. Swart for the loss of valuables at defendants' hotel. A judgment for defendants on verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Thomas A. E. Weadock, for appellant.

James McNamara, for appellees.

MOORE, J. Plaintiff was a guest at the hotel of defendants, and was assigned to a room with Mr. Loranger, also a guest, who was recovering from an illness, and both desired to have beds in the same room. Plaintiff carried a gold watch and chain valued by him at $120, a diamond-studded Elk watch charm, which had been presented to him about five years before by the Elks, which cost $200, and $12 in money. There was only one key to the room, as the clerk of the hotel informed plaintiff when the room was assigned. Before retiring plaintiff called a uniformed messenger boy, to whom he gave his trousers to be pressed. He was to return them at 7 o'clock next morning. The tailor was employed by the hotel. Plaintiff's recollection is that the room door had an ordinary single lock. Next morning plaintiff was partially awakened by Mr. Loranger taking a bath, but went to sleep again. He was awakened later by a rapping on the door, which he opened. The boy handed in the trousers, and when plaintiff reached into his hat on the dresser for his watch which he had put there the night before, the watch, chain, charm and money were gone. These articles were usually carried by plaintiff by day and kept in his room at night, and the amount of money was less than he ordinarily carried. Mr. Loranger arose before Mr. Weadock, and, unlocking the door, left the room for a short walk in the street. When he returned the door was closed. Mr.

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Weadock asked him if he had seen anything of his watch and money. He said no, and testified on the trial that he did not take them. Mr. Loranger's watch and money were not taken.

Defendants offered testimony of several witnesses contradicting the testimony as to the condition and kind of locks on the door, and the value of the property stolen. They offered evidence that they kept an iron safe in the hotel office, and had notices posted of the fact, and that plaintiff's watch, chain, charm, and money were not offered by him to be placed therein for safe-keeping. Mr. William Swart testified that out of two to three hundred guests in the hotel, four to a dozen valuable watches would be placed in the safe by the clerks. There was no fire escape near the windows of the room. The defense relied upon the statute, Act No. 42, Pub. Acts 1905, as a complete defense to the action. The court agreed with the defendants and directed a verdict for defendants.

Act No. 42, Pub. Acts 1905, provides in part as follows:

"SEC. 2. No innkeeper whether individual, partnership or corporation, who constantly has in his inn a metal safe or suitable vault in good order, and fit for the custody of money, bank-notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage books or tickets, negotiable or valuable papers and bullion, and who keeps on the door of the sleeping rooms used by his guests suitable locks and bolts, etc., * * * shall be liable for the loss of or injury to any such property belonging to any guest, unless such guest has offered to deliver the same to such innkeeper for custody in such metal safe or vault."

Mr. Swart in his testimony describes the lock as:

"* * * A double lock. It is just the same as if you put two locks on a door—a lock for the outside and a lock for the inside of the door. * * * When the door is locked from the inside, there is no way to open it from the outside at all. No one with skeleton keys can open it. * * * The locks have independent bolts. * * * It would be impossible for a man inside to get out. * * * I remember Mr. Loranger testifying that he arose before

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Mr. Weadock the next morning and went out. If that door was locked, he would have to unlock it from the inside. He would have to take his key on account of the lock being independent and lock it from the outside, or else wake up the other gentleman and have him lock it from the inside. If he went out and locked it from the outside, the gentleman inside could not get out. * * *"

The appellant insists upon two propositions: *First*, that the question of whether there were suitable locks and bolts upon the door presented a question of fact for the jury, and, *second*, that the statute does not include a watch and chain in habitual use by the guest.

As to the first of these propositions: The recollection of the plaintiff and the defendant who was sworn, differs as to the character of the fastening. It is clear the term "locks," as used in the statute, is broad enough to include the key or keys that go with the lock or locks. A lock without a key would not comply with the requirement of the statute. The clerk knew the room was to be occupied by two guests who occupied separate beds. These guests might want to leave the room at separate times from each other. When inquiry was made of the clerk for the key or keys he informed the plaintiff there was but one key to the lock. In view of the situation, as shown by the record, we think the suitableness of the locks was not a question of law, but should have been submitted to the jury as a question of fact.

As to the second question, Were the watch and chain included in the statute? The defendants cite the case of *Lang* v. *Hotel Co.*, 12 Wkly. Law Bul. (Ohio) 250, as conclusive. This was an opinion rendered in the court of common pleas for Hamilton county, and is not entitled to as much weight as though it was a court of final resort. The learned judge contented himself with saying that if the watch and chain were not jewelry, they were articles of gold manufacture.

On the part of plaintiff many cases are cited, among them *Ramaley* v. *Leland*, 43 N. Y. 539 (3 Am. Rep. 728),

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Jones v. *Hotel Latham Co.*, 62 Misc. Rep. 620 (115 N. Y. Supp. 1084), and *Kerlin* v. *Swart*, 143 Mich. 228 (106 N. W. 710), and it is said that the last-named case is conclusive in favor of the plaintiff. An examination of the cases cited by plaintiff shows that the statute under construction in each of them differed from the one now before us. The cases do settle, however, what is now conceded by counsel for defendants, that a watch and chain, in common use, are not "jewelry."

In the case of *Ramaley* v. *Leland*, *supra*, it was said:

"A watch is neither a jewel nor ornament, as these words are used and understood either in common parlance or by lexicographers. It is not used or carried as a jewel or ornament, but as a timepiece or chronometer, an article of ordinary wear by most travelers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as the daytime."

Counsel for defendants argue (we quote from the brief):

"As the testimony in this case, given by the plaintiff, says his watch and chain were gold, it is not straining the English language much to say that they must, therefore, of necessity be of 'gold manufacture.'"

In *Ramaley* v. *Leland*, *supra*, the court said, in part:

"The statute permits a proprietor of a hotel to relieve himself from his strict common-law liability, in respect to certain classes of property, upon compliance with the prescribed conditions. But the exemption is limited to the particular species of property named, and, being in derogation of the common law, cannot be extended in its operation and effect by doubtful implication, so as to include property not fairly within the terms of the act. The rules of the common law touching the liability of innkeepers, common carriers, and the like, have not been relaxed by the courts and are in full force, except as expressly changed by statute, or as they may be modified by special contract. By statute, the proprietors of hotels may provide a place of safe-keeping of 'money, jewels, or ornaments' belonging to guests, and by so doing, and giving notice as directed, they are not liable 'for such money, jewels, or ornaments' by theft or otherwise. Certain property, par-

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ticularly valuable in itself, taking but small space compared with its value for its safe-keeping, easy of concealment and removal, holding out great temptation to the dishonest, and not necessary to the comfort or convenience of the guest while in his room, is made the subject of the statutory exemption. Property of a different description, including all that which is useful or necessary to the comfort and convenience of the guest, that which is usually carried and worn as a part of the ordinary apparel and outfit, or is ordinarily used, and is convenient for use by travelers as well in as out of their rooms, is left, as before the statute, at the risk of the innkeeper. The words of the statute must be taken in their ordinary sense, in the absence of any indication that they were used either in a technical sense or a sense other than that in which they are popularly used."

Apply this rule to the statute before us. Does the sentence, "articles of gold and silver manufacture," include a watch and chain? It is common knowledge that the most important part of a watch, those parts which make it possible to keep time, are neither gold nor silver. If the legislature had intended to include in the statute an article of such general and necessary use as a watch, we think it would have used the word "watch" instead of saying, "articles of gold and silver manufacture."

Judgment is reversed, and new trial ordered.

BIRD, C. J., and STONE, J., concurred with MOORE, J.

HOOKER, J. I concur upon the ground that the question relating to the suitableness of the lock was a question for the jury. On other questions I reserve my opinion.

OSTRANDER, J., concurred with HOOKER, J.

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HOWCROFT *v.* DETROIT UNITED RAILWAY.

1. TRIAL—ABSENCE OF WITNESS—WITHDRAWAL OF JUROR—CONTINUANCE.

   It is not an improper exercise of discretion for the trial court to refuse plaintiff permission to withdraw a juror, on the ground alleged by plaintiff's attorney, of the absence of a witness, for which no sufficient excuse is offered.

2. MASTER AND SERVANT—PERSONAL INJURIES—FELLOW-SERVANT.

   The negligence of a motorman employed by defendant, in starting a car while plaintiff was in the act of boarding it, after his return from noon recess, for the purpose of riding across a street and upon a Y where plaintiff intended to assume charge of the car, in the course of his employment by defendant, was the negligence of a fellow-servant.

Error to Wayne; Donovan, J. Submitted October 28, 1910. (Docket No. 155.) Decided December 7, 1910.

Case by George Howcroft against the Detroit United Railway for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Thomas Hislop, for plaintiff.

Corliss, Leete & Joslyn, for defendant.

Plaintiff, injured December 19, 1905, while attempting to board one of defendant's cars, alleges in his declaration, in substance and effect, that he attempted to board one of said cars standing at the intersection of Mt. Elliott avenue and Waterloo street at the northerly switch, to ride in a southerly direction on Mt. Elliott avenue; that the conductor carelessly signaled for the motorman to start the car as plaintiff was entering it, and the motorman suddenly started the car, turning on the full current of electricity, throwing the plaintiff against the front part

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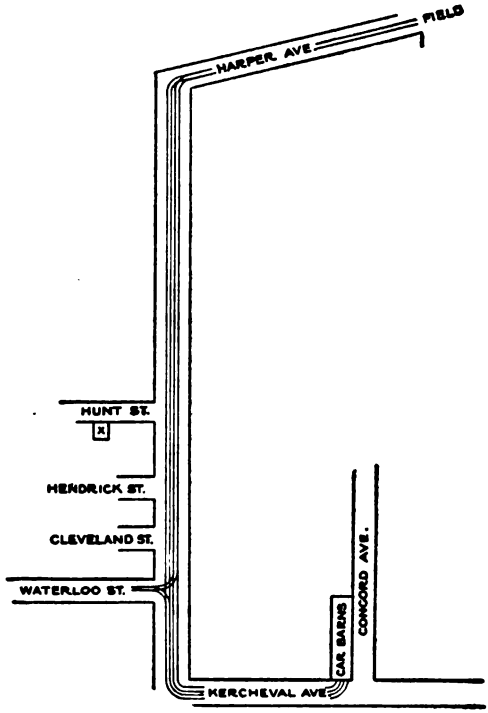
of the car, dragging him from the north to and beyond the south switch on Mt. Elliott avenue, and seriously injuring him. It is alleged that in attempting to board the car plaintiff was in view of both conductor and motorman; that the motorman was, and was known to defendant to be, incompetent to act as motorman on any car. The duty alleged is to employ careful and competent con-



ductors and motormen, and to operate cars with due care for the safety of passengers and others entering and alighting therefrom, not to start them when any one was entering or alighting therefrom. The defendant pleaded the general issue. The cause came on for trial March 14, 1910, before the court and a jury, and resulted in a ver-

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dict for defendant, directed by the court. Judgment was entered on the verdict.

Plaintiff was the only witness sworn, and his testimony, which should be considered with reference to the map or plat here shown, tends to prove the following: At the time he was injured, he was employed by defendant as a motorman, and had been so employed from some time in 1901. He lived on Hunt street, shown in the plat as running west from Mt. Elliott avenue. He had operated a car during the forenoon, taking it at the Kercheval street car barns, and running out Mt. Elliott avenue, returning to Waterloo street, where cars were turned on the Y. He had gone to dinner at his home, intending to resume work at 2:55 p. m., when he would take his car back of the switch on Waterloo street. He walked down Mt. Elliott from Hunt to Waterloo at about 2:50 p. m. His car, in charge of a motorman, whom he was to relieve, and of a conductor, was standing, or came to a stand—having come from the north—on the north side of Waterloo street. Its course there was to the south arm of the Y, then on that arm, backing in on the Y on Waterloo street preparatory to running out again on the north arm of the Y to Mt. Elliott avenue, and north on that avenue. The ride which plaintiff proposed to take was across Waterloo street and on the Y to a point where he, assuming charge of the car, could run it out on the north arm of the Y. He attempted to enter the front vestibule of the car. The car was started, and, while he retained his hold upon the car, he was seriously injured.

While the plaintiff was giving his testimony, the court intimated that he thought plaintiff was not entitled to recover because he was a fellow-servant of the motorman. When the cross-examination of plaintiff was concluded, the attorney for the plaintiff asked leave to withdraw a juror, stating, in substance, that upon the subject of the incompetency of the motorman a witness was absent, and could not be brought into court. The request was refused. An argument took place concerning the effect of

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the testimony of the plaintiff, with the result already stated. The court was of opinion, and stated, that the testimony of plaintiff proved that he was, upon the occasion in question, a fellow-servant of the motorman, for which reason he could not recover. Plaintiff has assigned as error that—

"(2) The court erred in refusing to permit plaintiff to withdraw a juror under the circumstances as shown in this case.

"(3) The court erred in refusing to permit plaintiff to show the incompetency of the motorman.

"(4) The court erred in refusing to permit the plaintiff to submit his case to a jury for its finding whether or not plaintiff was in this case a fellow-servant of the motorman in charge of the car, and in directing a verdict of no cause of action."

OSTRANDER, J. (*after stating the facts*). The record does not indicate that the plaintiff asked to have the case submitted to the jury. The court did not refuse to permit him to introduce testimony upon the subject of the incompetency of the motorman, because no such testimony was offered. The court did refuse permission to withdraw a juror, and we cannot say that in doing so sound discretion was not exercised. No excuse whatever was given for not having the witness present in court, except the one that counsel had not supposed the witness would be so soon wanted.

We may treat the record and the brief as presenting the question whether the court was in error in directing a verdict for the defendant upon the testimony of the plaintiff, although strictly no such question is raised by the assignment of error. It is asserted, in the brief, that plaintiff occupied the position of a stranger attempting to enter a car. We are of opinion that the testimony conclusively establishes the fact that he occupied no such position. To infer that he proposed to become a passenger to ride across Waterloo street and upon the Y, or that any one connected with the service so supposed, would be

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unreasonable. To infer that he attempted to enter the car for some purpose connected with his employment is reasonable. It was not claimed that defendant had knowledge that the motorman operating the car was incompetent, if he was so in fact.

The judgment is affirmed.

BIRD, C. J., and HOOKER, MOORE, and STONE, JJ., concurred.

DASCHO *v.* MICHIGAN ALKALI CO.

1. MASTER AND SERVANT — WARNING AND INSTRUCTING SERVANT —CHEMICALS.

   An employé working in caustic soda, who was injured by some of the chemical flying in his eye and burning it, was entitled to have the question submitted to the jury, whether or not the master should have warned and instructed him concerning the danger of being burned by the soda, where the evidence tended to show that the employé did not know of its dangerous properties and had not been advised by the employer concerning them.[1]

2. SAME—RISKS ASSUMED—COMMON KNOWLEDGE.

   It cannot be said as a matter of law that it is common knowledge that caustic soda is dangerous and will destroy the sight.

3. SAME.

   Under testimony tending to show that the injured employé was an ignorant man, that although he had been employed by defendant nearly two months he had not frequently come in contact with caustic soda and did not know it would burn, the question whether or not he assumed the risk was a question of fact.

[1] As to master's duty to warn or instruct servant, see note to *James* v. *Rapides Lumber Co.* (La.), 44 L. R. A. 88.

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Error to Wayne; Murphy, J. Submitted October 27, 1910. (Docket No. 134.) Decided December 7, 1910.

Case by Thomas Dascho against the Michigan Alkali Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Gray & Gray, for appellant.

Arthur W. Edwards (*George W. Coomer*, of counsel), for appellee.

STONE, J. In this action the plaintiff seeks to recover damages for the loss of his left eye, caused by an injury received by him on the 8th day of January, 1909, while in the employ of the defendant at its plant in Wyandotte. The defendant was there engaged in the manufacture of caustic soda, a compound of lime, soda ash, and water, which possesses burning and corrosive qualities. From appellant's statement of facts it appears that in the course of manufacture the caustic liquid is brought to a point where it is boiled in kettles until it reaches the proper consistency for the finished product. The boiling is done in what is called the "strong liquor department," a room 400 feet long and 200 feet wide, containing 64 kettles, set about 3½ feet apart, and each in a pit or well about 4 feet deep below the level of the floor. The sides of each pit are lined with fire brick. The kettles are heated by gas, led in pipes into the pits. When the liquid has been sufficiently boiled, it is taken off in ladles. The kettles frequently burn out under the strong heat. The metal becomes thin, and finally a small hole wears through the kettle, from which the liquid leaks into the bottom of the pit. It then becomes, at once, the duty of the attendant to shut off the gas and allow the kettle to cool, so that it may be replaced, and within 12 hours the kettle is usually cool enough to admit of this, but in the meantime more or less of the caustic has leaked through into the pit, where it slowly hardens. After the defective kettle has been re-

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moved and before a new one is put in place, the pit is cleaned out. By that time the caustic has so hardened that it is necessary to use a bar or pick to break it up, so that it may be easily shoveled out.

It appears from the testimony of defendant's witness that the leak in one of the kettles was discovered on the afternoon of the day before the plaintiff was injured, and that the fire was immediately shut off. The next morning the plaintiff was directed to help in removing the defective kettle, which he did, and the pit was then open, and on the bottom there was a quantity of caustic more or less hardened. The plaintiff and his companion were then sent by the foreman with a crowbar and hammer into the pit, to break up and remove the caustic. The testimony varied as to the exact happening of the injury. The plaintiff and his companion testified that the former was holding the bar, while the latter struck the bar with the hammer. But one of defendant's witnesses testified that the bar had been driven under the caustic, so as to pry it up, and that the plaintiff's companion, instead of hitting the bar, used the hammer directly on the caustic. However, it appears that when the hammer fell the caustic was broken into pieces, and one piece flew up and struck plaintiff in the eye, inflicting the injury complained of.

The plaintiff is a German, who testified through an interpreter. He was 47 years old at the time of the trial. He commenced to work for defendant on November 17, 1908. He had never worked before where caustic soda was made. He was a common laborer, and his work about the plant had been varied. He admitted on cross-examination that twice before the injury he had been called to work in the caustic soda plant; that he assisted in taking a kettle out and in putting one in, but that he never before took part in cleaning out the pit. He had worked driving team, hauling cinders, and also in the dissolver ash department, in the strong liquor department, and in the powdered caustic department, unloading salt, unloading coal, wheeling ashes, and on one or two occasions had

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shoveled some of the manufactured article into an elevator, and at another time he had helped load bags onto a cart. It is undisputed that at the time of the injury both the plaintiff and his companion had their feet wrapped in bags or cloths, and had mittens on their hands. The plaintiff claimed, however, that he was told to wrap his feet because otherwise his shoes would be burned, but that he was not told where the heat was, whether in the floor or something else; and that he had his mittens on when working outside, and when he was called in, he kept them on. Upon the subject of his knowledge of the properties of caustic soda the plaintiff testified:

"I found out what caustic soda was when I lost my eye. I did not know before that. Before I worked at the Michigan Alkali Company, I always worked with the farmers, and never worked at any place where caustic soda was made. I never used caustic soda myself for any purpose before that time. I did not know what it was made of, or what it was used for."

One of the defendant's witnesses, the superintendent of the caustic plant, testified as to the nature of caustic soda as follows:

"The material is usually called caustic soda. The chemical—sodium hydrate. That is, the hydrate that is in it; it depends upon how much is in it. It is a white brittle solid, and has a powerful caustic quality. It does not destroy animal and vegetable matters. If you put your hand in the fire it will burn. The fact that it is used for making soap shows that it does not destroy the fat. When it touches flesh it burns it for a length of time."

There was no claim or testimony that the plaintiff had ever been instructed as to the dangers of working where caustic soda was manufactured, or that he had ever been warned of any danger. It is the claim of the plaintiff that he should have been so warned and instructed. Upon the trial of the case the defendant moved for a directed verdict in its favor. This was denied, and the case was submitted to the jury, and they returned a verdict for the plaintiff in the sum of $2,500 damages. The de-

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fendant has brought the case here upon writ of error, and the only error assigned is upon the refusal of the court to direct a verdict for the defendant. It claims that it is common knowledge that caustic soda possesses burning and corrosive qualities, and that such a substance when struck might fly up; and that the plaintiff therefore assumed the risk, and was chargeable with such knowledge.

An excerpt from the charge of the court will show that the case was submitted to the jury upon a clear and narrow issue. Speaking of the mass of caustic soda, the court said:

"It was a brittle mass, and any man of reasonable prudence or care must know, while working upon it in the manner in which he and his companion were working, that it would have chipped off, be deflected, and perhaps strike him. So that it cannot be said that any cause of action arises from the fact that chips flew up from the mass of hardened caustic soda. But it appears that chips which did fly up struck the plaintiff and burned him, and that is the sole issue of fact presented in this case, namely: Is the defendant to be charged with negligence in not having informed the plaintiff that the caustic soda, if it struck plaintiff, would burn him? So, gentlemen of the jury, your inquiry, when you come to ask yourselves, first, is the plaintiff chargeable with any negligence himself; secondly, is the defendant company chargeable with negligence—that inquiry should be devoted solely to the question whether or not the plaintiff knew, or should have known, that that caustic soda would burn him; and whether or not the defendant company, through some of its agents, should have notified him that the caustic soda would burn if it touched him. That is the sole ground upon which negligence is claimed in this case by the plaintiff."

Did the court err in thus submitting the case to the jury? Much depends upon the intelligence and experience of the plaintiff in determining whether he understood, or should have understood and appreciated, the danger. *Swoboda* v. *Ward*, 40 Mich. 420. The language of this court in *Parkhurst* v. *Johnson*, 50 Mich. 70 (15 N. W. 107, 45 Am. Rep. 28), where there was failure to notify

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an employé of an unusual risk, is appropriate here. Justice COOLEY said:

"The circuit judge thought there was some evidence of negligence on the part of Johnson in these facts, and we agree with him. He took an inexperienced man into a place of danger without apprising him of the risks, and without any warning that danger was to be anticipated. It is true the workmen in the business testify that they do not consider it dangerous, and probably it is not when one fully understands it; but this man did not fully understand it, and the danger and loss of life came to him in consequence."

See, also, *Smith* v. *Car Works*, 60 Mich. 501 (27 N. W. 662, 1 Am. St. Rep. 542); *Charron* v. *Carbide Co.*, 151 Mich. 687 (115 N. W. 718); *Potvin* v. *Shipbuilding Co.*, 156 Mich. 201 (120 N. W. 613). We think that the question of the master's duty to warn its servant in this case was for the jury. See *Adams* v. *Refrigerator Co.*, 160 Mich. 590 (125 N. W. 724, 27 L. R. A. [N. S] 953).

We cannot say, as matter of law, that the plaintiff knew, or was bound to know, the burning properties of caustic soda, and we think that question was properly submitted to the jury. *Snow* v. *Power Co.*, 162 Mich. 579 (127 N. W. 677); *Goda* v. *Maurer*, 162 Mich. 621 (127 N. W. 799). We are of opinion that the issue was fairly and fully submitted to the jury as to whether the plaintiff knew, or should have known, that caustic soda would burn. Had the pit been filled with a hardened mass of sand or sawdust, and had the foreman directed the plaintiff to break it up and shovel it out, there would have been no duty resting upon defendant's agent to have informed plaintiff of any latent danger, because a person of no more intelligence or experience than plaintiff possessed would, or should have known the nature of such substances, as common knowledge. But that cannot be said of caustic soda, because it is quite apparent, judging from results, that caustic soda, when coming in contact with a person's eye, is dangerous, and we think

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that knowledge of that fact is not common knowledge.

We find no error in the record, and the judgment of the circuit court is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

TUTHILL *v.* KATZ.

1. JUDGMENT—DECREE IN EQUITY—CONCLUSIVENESS.
   In an action of ejectment to recover the possession of lands which defendants claimed to own by virtue of a deed containing a mistake in the description, a decree previously entered in chancery proceedings, in which defendant's grantor was a complainant and plaintiff was a defendant, involving the same mistake, was not admissible in evidence, where the decree ordered that the bill of complaint, which contained a prayer for the correction of the mistake, be dismissed, without reciting the reasons therefor, or determining the question at issue in ejectment.

2. DEEDS—EJECTMENT—CONVEYANCE—DESCRIPTION.
   The description in a deed of a parcel of land known as the William Rowley farm, sufficiently identified by the evidence, is a sufficient conveyance of the premises, although it contains also an erroneous description by governmental subdivisions: the mistaken portion of the deed must be rejected, and remainder be treated as controlling, in an action at law.

3. SAME—DESCRIPTION—MISTAKE.
   False and impossible parts of descriptions in conveyances may be rejected if by doing so a good description remains.

4. SAME—EVIDENCE—EQUITY JURISDICTION.
   Parol evidence may be resorted to in applying a deed to its subject-matter, in an action of ejectment, if the description is ambiguous.

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5. SAME—TAXATION—NOTICE TO REDEEM FROM TAX PURCHASE. Defendants in ejectment who claim to be in possession of real property, gain no additional rights by virtue of a tax deed from the State, if they have failed to serve the statutory notice, which is held to be a condition precedent to the vesting of title under tax proceedings. *Huron Land Co.* v. *Robarge*, 128 Mich. 686 (87 N. W. 1082).

Error to Calhoun; North, J. Submitted November 17, 1910. (Docket No. 102.) Decided December 7, 1910. Rehearing denied February 1, 1911.

Ejectment by Rosette I. Tuthill against Frank Katz and Frederick Katz. A judgment for plaintiff on a verdict directed by the court is reviewed by defendants on writ of error. Reversed.

Louis C. Miller, for appellants.

J. M. Hatch, for appellee.

STONE, J. This is an action of ejectment in which the plaintiff seeks to recover possession of 17.74 acres of land, more or less, being all of the northwest fractional quarter of section 15, lying between the east half of southwest quarter of section 10 and Cedar Lake, in town 3 south, of range 6 west, situate in the township of Fredonia, Calhoun county. The plea was the general issue, with notice of special matter, that it will not be necessary to refer to specifically.

It is undisputed that as early as September, 1861, one William Rowley was the owner of the premises in question, and that he continued to own the same, at least, until September, 1878; and that, with certain other lands on section 10 in the same township, they were known as the William Rowley farm. At the trial, the plaintiff's claim of title consisted of two quitclaim deeds to her, both bearing date January 24, 1882, one executed by William Rowley, and the other by William Rowley and his wife, Sarah, and both duly recorded. It was admitted that at the time

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of commencement of suit, the defendants were in possession of the premises in question, and that plaintiff had never been in actual possession. Claiming to defeat the plaintiff's claim of title, the defendants offered in evidence the following described deeds:

(1) A warranty deed bearing date September 18, 1878, between William V. Rowley and Sarah Rowley, his wife, of the township of Fredonia, Calhoun county, Mich., of the first part, and Alonzo J. Rowley, of the same place, of the second part, in consideration of $3,000, purporting to convey all of the following described lands and premises, to wit:

"The southeast quarter of the southwest quarter, 40 acres, the northwest quarter of the southeast quarter, 40 acres, and the south half of the northwest quarter, 80 acres, of section ten. Also the northeast fractional quarter of section fifteen, 17⅓ acres. All in township number three south, of range number six west, in Calhoun county and State of Michigan, containing one hundred and seventy-seven and one-half (177½) acres according to the United States survey, and known as the William Rowley farm, excepting forty acres reserved as a homestead, in Fredonia, saving and reserving and excepting above granted, a life estate during the natural life of said William V. Rowley and Sarah Rowley, his wife, and of the natural life of the survivor of the two, which life estate to himself and his wife, and the survivor of the two is reserved and excepted to secure to them a home for life, as will more fully appear by a lease from said Alonzo J. Rowley and Mary E. Rowley, his wife, to William V. Rowley and Sarah Rowley, his wife, bearing even date with this deed, securing a life estate to said William V. Rowley, and his wife, Sarah, and to the survivor of the two, which provisions for my wife are in lieu of dower, and if accepted will bar all right of dower."

The deed concludes with the usual covenants of a warranty deed, excepting what is reserved and excepted. Deed recorded October 17, 1881.

(2) A certified copy of a warranty deed dated January 12, 1882, executed by Alonzo J. Rowley and Mary E. Rowley, his wife, as grantors, to George S. Woolsey, as

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grantee, consideration $560, describing the same premises, and in the same way, and subject to the same life estate as in paragraph (1) above, and also subject to a mortgage. This deed was recorded February 19, 1882.

(3) A certified copy of a warranty deed dated February 8, 1909, executed by George S. Woolsey and Phebe J. Woolsey, his wife, as grantors, to Frank G. Katz, as grantee, for a consideration of $6,000, describing the premises as follows:

"All of the south half of the northwest quarter of section ten (10), also all of the east half of the southwest quarter of section ten (10), also the northwest quarter of the southeast quarter of section ten (10), and also all that part of the east half of the northwest quarter of section fifteen (15) north of Cedar Lake, all being in town three (3) south, of range six (6) west."

This deed was duly recorded February 8, 1909.

It also appeared that said George S. Woolsey purchased the life estate of Sarah Rowley on April 24, 1906, by deed recorded May 15, 1906, and that both William Rowley and Sarah Rowley died before the beginning of this suit. It also appeared, and was undisputed, that William Rowley lived upon this farm for about 20 years, the buildings being located on section 10; that it was known as the William Rowley farm; that the farm was fenced with line fences between it and adjoining farms; that it consisted of the south half of the northwest quarter, the southeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter, all on section 10, and the northeast fractional quarter of the northwest quarter of section 15; that there was no part of the William Rowley farm, as it was then known, on the northeast fractional quarter of section 15, and that he never owned any land on that east side of the lake; that there were 17½ acres in the parcel described as the northeast quarter of the northwest fractional quarter of section 15, and 131 acres on the northeast fractional quarter of section 15. The buildings were located on the north side of the highway on the

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northeast quarter of the southwest quarter of section 10, and that description constituted his homestead; that there was no fence between the northeast fractional quarter of the northwest quarter of section 15, the premises in dispute here, and the premises immediately north of them; that all was occupied as one parcel and belonged to the same farm—the William Rowley farm—and that he had no other farm. It also appeared, and was not disputed, that after William Rowley deeded to Alonzo J. Rowley, William Rowley and wife remained in possession until William Rowley died, and after that time Mrs. Rowley remained in possession until she deeded to George S. Woolsey, who was in possession until he sold to defendant, Frank G. Katz, and the latter has been in possession ever since. Upon rebuttal, the plaintiff offered in evidence the records and files in a chancery case in the circuit court in chancery, of Calhoun county, wherein George S. Woolsey was complainant and William V. Rowley, Sarah Rowley, Rosette I. Tuthill, Alonzo J. Rowley, and Mary E. Rowley were defendants. The defendants William V. Rowley, Sarah Rowley, and Rosette I. Tuthill answered, and the other defendants did not appear, and the bill of complaint was taken as confessed as to them.

One object of this bill of complaint was to obtain a decree correcting the description of the 17½ acres of land in dispute, contained in the deed from William V. Rowley and wife to Alonzo J. Rowley. It stated that by mistake the land had been described as the northeast fractional quarter of section 15, whereas it was the intention of the parties to convey the northeast fractional quarter of the northwest quarter of said section. No affirmative relief was claimed by the defendants who answered in said cause. Upon the hearing of said chancery cause, in 1890, the bill of complaint was by decree dismissed as to said land on section 15, and no relief whatever was granted the complainant, as affecting the premises in question. The said files and records were admitted in evidence upon the trial, against the objection and exception of the defend-

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ants. At the close of the testimony the plaintiff moved for a directed verdict in her favor.

The defendants presented the following requests to charge:

"(1) If you shall find that on September 18, A. D. 1878, William Rowley owned the premises described in the declaration in this case, to wit, the northeast fractional quarter of the northwest fractional quarter of section 15, township of Fredonia, Calhoun county, Michigan, that his dwelling house was not situated on this particular description, and it constituted no part of his homestead, and that these premises were a part of, and belonged to what was known as, the William Rowley farm, in the said township of Fredonia, and that William Rowley did not own the northeast fractional quarter of said section 15 in said township of Fredonia at that time, then your verdict must be for the defendants.

"(2) There is no dispute in the evidence in this case, and I direct you to find a verdict for the defendants."

Both of defendants' requests to charge were refused, and the court granted plaintiff's motion, and directed a verdict for the plaintiff.

The defendants have brought error, and claim by their assignments of error that the court erred in admitting in evidence the files and records in the chancery case; also that it erred in directing a verdict for the plaintiff, and in not granting defendants' requests to charge. The questions raised may well be considered together.

We are unable to see wherein the files and records in the chancery case were relevant to the issue. It appears that while George S. Woolsey claimed to be the owner of the premises, he filed this bill of complaint to have an alleged mutual mistake, in the deed from William V. Rowley and wife to Alonzo J. Rowley, corrected. William Rowley and wife and this plaintiff answered, but claimed no affirmative relief. Upon the hearing, the circuit judge dismissed the bill. The reasons given were no part of the decree, and the parties were left *in statu quo*.

The grantee of Woolsey, one of the defendants here, now claims that there was a mistake in the description of

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the land on section 15, in the deed; but the defendants say that notwithstanding the mistake, taking the whole deed and description of the premises into consideration, the mistake corrected itself, and it was a good deed of the lands on the northwest fractional quarter of section 15. The plaintiff claims under subsequent deeds from William Rowley. This brings us to the consideration of the meritorious question in the case.

In the light of all the evidence in the case, can it be said that the deed from William Rowley and wife to Alonzo J. Rowley, and the deed from the latter to George S. Woolsey (both of which were delivered before plaintiff's quitclaim deeds were made) conveyed title to the premises in question? The lands in section 15 were erroneously described. It appears, however, that the northwest fractional quarter of section 15 constituted a part of the William Rowley farm, and the place was "known as the William Rowley farm." The uncontradicted evidence shows that the said farm was well known and defined; that it was fenced, and occupied by William Rowley as one property. He did not own the northeast fractional quarter of the section. The latter description contains 131 acres, while the former contains only 17 and a fraction acres, which corresponds with the number of acres described in the deed. It is a significant fact that the said William Rowley occupied the northwest fractional quarter as a part of his farm. Probably nobody would deny that a deed of the farm in Fredonia township, known as the William Rowley farm, would convey title to such farm as known and occupied. But it is claimed that when there is an attempt to describe government subdivisions, or by metes and bounds, that the same must be described correctly and without ambiguity. Fortunately we are not without authority upon this subject in this State.

In the early case of *Ives* v. *Kimball*, 1 Mich. 308, a deed described a piece of land, as all that tract or parcel of land situate in the town of Logan, county of Lenawee,

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and Territory of Michigan, being known and distinguished as the east half of the northwest quarter of section 21, in township No. 26 south, of range No. 3. There was no surveyed township No. 26 in Logan. *Held*, that the number of the township might be rejected, as repugnant to the other parts of the description. And, it appearing from the act organizing the town, that there were two sections numbered 21 in the town, corresponding with the description in the deed, one in surveyed township numbered six, and one in surveyed township numbered seven, both in range 3 east, the same was held not to be a patent ambiguity, although the court was bound judicially to take notice of the act organizing the town, and that parol evidence of surrounding circumstances and collateral facts might be received to show which of the two sections was intended by the grantor. It is said that as a rule ambiguities in the description of property are necessarily latent, as it is not until the description is attempted to be applied to the property itself, which must be by parol aid, that the ambiguity is perceived, and whenever the ambiguity is made apparent by parol aid, it must be removed by parol evidence. False and impossible parts of descriptions should be rejected, where, by so doing, a good description remains.

If the term "known as the William Rowley farm," points out with sufficient certainty the premises to be conveyed, then the additional false or mistaken description, to wit, the northeast fractional quarter of section 15, does not vitiate it. The subdivision of the section described, it seems, must have been a mistake in the deed, if a part of the William Rowley farm, and, being false, it must be rejected. But this does not render the deed void.

We quote from *Ives* v. *Kimball*, 1 Mich. 308, as follows:

"In the case of *Boardman* and others v. *Lessees of Reed* and *Ford*, 6 Pet. 345. Mr. Justice McLean, delivering the opinion of the court, says:

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"'The entire description in the patent must be taken, and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls in the patent, clearly appears to have been made through mistake, that does not make void the patent.'

"In that case, the land was described in the patent as lying in the county of Monongalia, and further described by reference to natural monuments, and it appeared that the land described by the monuments was in the county of Harrison, and not in Monongalia; and that part of the description which related to the county was rejected, and effect given to the patent. In the case of *Stringer* and others v. *Lessee of Young*, 3 Pet. 320, the same question arose upon a similar patent, and Chief Justice Marshall, delivering the opinion of the court, says that the 'misnomer of the county must admit of explanation; and if explanation can be received, the patent is not absolutely void.' The question in the case of *Loomis* v. *Jackson*, 19 Johns. (N. Y.) 449, arose between a party claiming under a mortgage, and a subsequent purchaser from the mortgagor. In the mortgage, the land was described as being a part of lot No. 51; in the deed, as being a part of lot No. 50. The descriptions in the deed and mortgage were the same in every respect, except that the deed expressed the true number of the lot. Both instruments contained other calls from which the land could be identified, and the court rejected the false number in the mortgage, and held it valid. Indeed, the doctrine that 'if there be certain particulars sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance false or mistaken, will not frustrate the grant,' accords too plainly with 'the suggestions of good sense and dictates of morality,' ever to be seriously questioned."

It will be noted that *Ives* v. *Kimball*, *supra*, was a law case. Many other authorities are there cited and reviewed.

Moran v. *Lezotte*, 54 Mich. 83 (19 N. W. 757), was an action of ejectment. It was there held that the statement of quantity in the descriptive clause of the deed may properly be taken as controlling, where the circumstances show that it is the particular least likely to be wrong, and where the description is ambiguous or indefinite in respect to

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fixed lines and monuments. It was there held that in ejectment for land which defendant claims was not included in the deed under which the plaintiff's title is asserted, the plaintiff, if the deed is ambiguous, can show such conjoint acts of the parties thereto, as tend to show their understanding of the location of the boundary, etc.

In the instant case, we have quoted enough of the language contained in the deed to show that it was the intention of the parties that the home farm was being conveyed, and details were entered into relating to a life lease, etc.

In *Persinger* v. *Jubb*, 52 Mich. 304 (17 N. W. 851), it was held, in an action of ejectment, that a description in a deed may be sustained if, with the aid of the usual local inquiries, there would be no difficulty in locating the land. Would there have been any difficulty in locating the Rowley farm, in view of the undisputed evidence in the case? We think not.

In *Wilt* v. *Cutler*, 38 Mich. 189, which was an action of ejectment, a deed dated in 1840 described land as situated in the county of Lenawee and Territory of Michigan, and assigned part of it to township 7 south, range 7 east. There was such a township and range in Monroe county, but not in Lenawee, and at the date of the deed Michigan was no longer a Territory. In construing the deed, the general description by the name of the county was rejected, and it was held good for lands in the township and range specified. We might quote from many other cases, but will simply cite a few that are in point: *Anderson* v. *Baughman*, 7 Mich. 69 (74 Am. Dec. 699); *Russell* v. *Sweezey*, 22 Mich. 240; *Slater* v. *Breese*, 36 Mich. 77; *Francis* v. *Barry*, 69 Mich. 311–319 (37 N. W. 353); *Austin* v. *Dolbee*, 101 Mich. 294 (59 N. W. 608).

Plaintiff's counsel errs in claiming that only an equitable title passes under such circumstances as we have referred to. We have shown that in ejectment parol evidence may be resorted to to aid the court in applying the deed to its proper subject-matter, where there is ambiguity. Under the evidence, the premises conveyed could

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not have been in the northeast quarter of section 15, if a part of the Rowley farm.

As the case must go back for a new trial, we note in passing that the defendants could claim nothing for the tax deed offered in evidence, as there was no evidence of service of the statutory tax notice, which is a condition precedent to vesting title under the tax proceedings. *Huron Land Co.* v. *Robarge*, 128 Mich. 686 (87 N. W. 1032).

We think that the court erred in directing a verdict for the plaintiff, and in refusing to give defendants' requests to charge the jury.

The judgment must be reversed, and a new trial granted.

BIRD, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

MINCER *v.* WAYNE CIRCUIT JUDGE.

1. EQUITY—PRACTICE—MANDAMUS—DIVORCE—ALIMONY—SUPPLEMENTARY DECREE.

   A petition in proceedings for divorce in the Wayne circuit court in chancery, to determine the question of alimony, after the entry of a decree and the postponement by mutual consent of the question of the amount to be paid by the defendant husband to petitioner, should be brought on before the judge that heard the original cause.

2. SAME.

   Mandamus will not lie to compel the judge who presides in chancery in Wayne county to hear such petition for alimony, and to enter a decree in the nature of a supplemental decree, determining the amount to be paid by the husband, when the testimony in the cause was heard by another of the judges.

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Mandamus by Jennie Mincer to compel Morse Rohnert, one of the Wayne circuit judges, to set aside an order dismissing without prejudice a petition of relator to determine the amount of alimony to which she might be entitled in divorce proceedings. Submitted November 15, 1910. (Calendar No. 24,019.) Writ denied December 7, 1910.

Sloman & Sloman, for relator.

Friedman & Smilansky, for respondent.

PER CURIAM. Relator asks for a mandamus to compel Hon. Morse Rohnert, one of the circuit judges for Wayne county, to vacate and set aside a certain order made by him, sitting in chancery, denying her petition to inquire into the financial circumstances of Sol. Mincer, and to fix the amount of permanent alimony to be decreed her in the case of petitioner against said Sol. Mincer, wherein a decree of divorce had theretofore been granted to her, reserving the matter of fixing such alimony for future determination.

It appears from the petition, and the answer of respondent, that the divorce case was heard before Hon. Henry A. Mandell, March 22, 1909, and the decree mentioned granted; that complainant "consented that the matter of permanent alimony be deferred as provided in said decree, because of the representations of the defendant made at the time, that he was in helpless financial circumstances;" that this petition was filed about one year thereafter, and came on to be heard upon petition and answer before respondent March 11, 1910, when the order complained of was made, denying the prayer of the petition, without prejudice. In this proceeding petitioner urges that mandamus should be granted, because the denial of the relator's petition by respondent was "arbitrary, unjust, an abuse of discretion, and against her just rights." Respondent makes full answer and return to the order to show cause, from which answer it appears that there were

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many allegations in the petition for mandamus of which he had no knowledge whatever; that he suggested the matter ought to be heard by the judge who entered the original decree of divorce and knew more about the facts than respondent; that this suggestion was not acted upon and the hearing was had; that after argument respondent "dismissed the petition without prejudice to filing another one."

This proceeding in the circuit court to determine permanent alimony, as provided for by the decree, was a proper one to be heard before the judge who had heard and determined the case. As suggested by respondent, such judge was familiar with the facts in the case. This was not an incidental or formal proceeding. The evidence had been heard in the case, and now, by the terms of the decree, further evidence was to be submitted upon the question of permanent alimony, which necessarily required a supplemental or amended decree. The suggestion of respondent should have been followed, which, as we understand, is in accord with the practice in Wayne county, where the circuit court is presided over by six judges.

Whether the respondent gave other reasons for his action is not material. His conclusion was correct. His order does not deprive petitioner of an adequate remedy. It was made without prejudice to filing another petition, and the remedy has been open in this case to file such petition and bring the matter before the proper judge at any time.

The writ is denied, without costs.

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JAGERISKEY v. DETROIT UNITED RAILWAY.

1. TRIAL—CONDUCT OF COURT—IMPROPER REMARKS—WITNESSES.
   Prejudicial error is committed in a trial of a negligence case by the trial judge remarking in the presence of the jury that plaintiff's views relative to faith healing were not religion and too "fakey," and such remarks constituted improper comment on plaintiff's religious opinions.

2. SAME—NEGLIGENCE—CARRIERS—PERSONAL INJURIES—DAMAGES.
   It is the duty of the trial court to instruct the jury concerning the measure of damages in an action against a street railway company for negligent injuries to a passenger; and the requirement is not met by a charge that the damages were entirely for the determination of the jury.

3. SAME.
   Plaintiff was entitled to have a requested instruction given, that the amount of damages must be such sum as would make her whole or compensate her for such injuries as they might find she had suffered, or would suffer in the future, as a result of defendant's negligence.

Error to Wayne; Donovan, J. Submitted November 17, 1910. (Docket No. 97.) Decided December 7, 1910.

Case by Anna Jageriskey against the Detroit United Railway for negligent injuries to her person. A verdict and judgment of $100 damage is reviewed by plaintiff on writ of error. Reversed.

William Van Dyke, for appellant.

Corliss, Leete & Joslyn (*A. B. Hall*, of counsel), for appellee.

BIRD, C. J. This is a personal injury case, in which plaintiff recovered a judgment of $100 in the Wayne circuit court. On account of the inadequacy of the judgment she brings the case to this court for review.

It was the claim of plaintiff that she was a passenger on

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one of defendant's cars in the city of Detroit, and when she was in the act of alighting therefrom, at the intersection of Jefferson and Beauford streets, the car suddenly started and threw her to the ground with such force that it injured her back and side; that she was laid up on account of her injuries for three months, and had not fully recovered at the time of the trial; that she was obliged to have help to care for her during the time, and that her doctor's bill was $187. The negligence relied upon was the sudden starting of the car, without any notice to her, as she was about to step to the ground. Defendant's counsel took part in the trial, but offered no testimony. The errors of which the plaintiff complains relate to the remarks of the court during the progress of the trial, the charge of the court, and the court's refusal to give his requests to charge.

The testimony disclosed that plaintiff was a seamstress, and that she gave "faith healing" treatments, and that she was on her way to see one of her patients when the accident occurred. While upon the witness stand she was cross-examined at a considerable length about her efforts at "faith healing." She testified that she and her brother and a 10-year old girl took a car and went to Delray about three o'clock in the morning, and there behind a billboard dug a hole. The cross-examination then proceeded as follows:

"*Q.* What did you do?

"*A.* I stood there and prayed while my brother dug hole.

"*Q.* What did you dig a hole for? (Objected to as incompetent and immaterial, inquiring into this woman's rites.)

"*The Court:* I do not think that is religion anyway; you may ask about it.

"*Q.* What did you dig a hole for?

"*A.* Because for woman that had been under operation, and she wanted to go back home to Cleveland, and she could not get out of bed, and I knew if I would do as I was told to do, I would have her strong enough to get out of bed and go home to Cleveland.

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"*Q.* Who told you to do this?
"*A.* That is the angel.
"*Q.* What angel?
"*A.* Casimir. (Objected to, and I ask that it be stricken out.)
"*The Court:* I think that it has a direct bearing whether she is able to do what she says.
"*Mr. Van Dyke:* I want an exception to the court's ruling.
"*Q.* It is the Angel Casimir?
"*Mr. Van Dyke:* May all this be taken, subject to the objection and the exception?
"*The Court:* Certainly.
"*Q.* Does Angel Casimir live on this earth, or some other place?
"*A.* Lives with God in heaven.
"*Q.* And Angel Casimir told you to go down and dig a hole in Delray?
"*A.* Yes, sir.
"*Q.* What did you have the little child with you for?
"*A.* To pray."

The cross-examination proceeded further along these lines, when plaintiff's counsel again objected that the testimony was incompetent, irrelevant, and immaterial, "as it is part of her religious rites."

"*The Court:* I do not think this is religion; you cannot make this religion with me; it is too fakey. If that is religion, I don't want to hear anything more about it."

It is claimed that these remarks of the court were prejudicial to the plaintiff's case; that the result of such remarks was so stamp plaintiff as a religious fakir, and destroy her standing before the jury, and lead them to disbelieve her injuries, and doubt her loss on account of them.

We agree with counsel that the remarks of the court were harmful to the plaintiff's case. However absurd the plaintiff's acts and beliefs might appear to others, she was evidently sincere in them, and was entitled while in court to have them passed without question or comment, except so far as was necessary to show her physical condition and activity. We feel that something more than this

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was done in plaintiff's examination. Her acts and beliefs were unduly developed and commented on in such a manner as to mitigate the damages, to which the testimony showed she was justly entitled. When one's peculiar religious views are made use of for this purpose and it is obvious, as it is here, that the use had the desired effect, the verdict ought to be set aside.

Plaintiff's counsel requested the court to charge upon the question of damages, as follows:

"I charge you that the amount of the damages which you must award the plaintiff must be for such a sum as will make her whole or compensate her for such injuries as you find she has, or will in the future suffer on account of the accident and negligence of the defendant."

The court refused this, and instead gave the following:

"I am unable to determine what sum you are to determine upon. That is entirely for the jury."

This has the merit of brevity, but not of sufficiency. It was the duty of the trial court to instruct the jury as to the law applicable to the case. 3 Comp. Laws, § 10243. A failure to do so is error. *Simons* v. *Haberkorn*, 139 Mich. 131 (102 N. W. 659).

Jurors are not supposed to know, without instruction, of the different elements of damage in a personal injury case, and it is the duty of the trial court to point out those elements on which a recovery may be had. This comes clearly within the duty enjoined upon him by the statute. In this instance the court not only failed to cover the question of damages in his general charge, but refused to give the unobjectionable request of counsel on that subject. We think the refusal of the trial court to give the request was error.

For the errors pointed out, the judgment is reversed, with costs of both courts, and a new trial ordered.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

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LEFFONIER v. DETROIT & MACKINAC RAILWAY CO.

1. FIRE—NEGLIGENCE—RAILROADS—QUESTION OF FACT.
In an action for negligently permitting fire to escape from defendant's premises upon plaintiff's farm in dry weather, destroying his property, plaintiff was entitled to take the verdict of the jury under evidence tending to show that a witness saw defendant's employés burning ties and refuse on its property, just before the 1st or 2d of August, and the plaintiff's property was destroyed when he next went by that way, a few days subsequently; and whether or not the witness was mistaken in the dates was a question of fact, where it appeared that the fire occurred on July 27th.

2. PRINCIPAL AND AGENT—MASTER AND SERVANT—FIRE.
Sectionmen of a railroad company, who set fires in the course of their employment, in violation of the orders of the employer, and negligently permit fire to escape onto premises of another, render the company liable for their act.[1]

Error to Alpena; Emerick, J. Submitted November 29, 1910. (Docket No. 82.) Decided December 7, 1910.

Case by Joseph Leffonier against the Detroit & Mackinac Railway Company for the negligent setting of fires. Judgment for plaintiff. Defendant brings error. Affirmed.

Charles R. Henry and *Guy D. V. Henry*, for appellant.

Joseph H. Cobb and *Fred P. Smith*, for appellee.

BROOKE, J. Plaintiff brings this action to recover the value of certain property destroyed by fire. It is his claim that defendant's sectionmen negligently set fire to a pile of old ties and rubbish upon the railroad right of way

[1] As to liability of railroad company for setting fires which spread to property of others, see note to *Brown* v. *Brooks* (Wis.), 21 L. R. A. 262.

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during the dry season of the summer of 1907; that the fire was negligently permitted to escape from the premises of the defendant, and, after crossing an intervening farm, it came upon the premises of plaintiff, destroying his property.

Testimony was introduced tending (though not clearly) to show that plaintiff's property was destroyed July 27, 1907. The only testimony introduced by plaintiff having a tendency to prove that the fire which caused plaintiff's loss originated upon defendant's right of way was given by one Mainville, supervisor of the township of Alpena. He testified that on one occasion he had seen men upon defendant's right of way, in the vicinity of plaintiff's farm, clearing up and burning old ties and refuse, that he remonstrated with the men, telling them that they were liable to be prosecuted for setting fires at that time of year. When asked to fix the date of this occurrence, he testified:

"Well, it must be in the early part of August, for I had to make a report to the State warden, fire warden, and I went down there with that report, for the July report. I made it the first couple of days in August. * * *

"*Q.* Were you by Mr. Leffonier's place a few days after that?

"*A.* Yes; I was.

"*Q.* State whether or not at that time the buildings on his place were burned?

"*A.* When I went by they were burned; yes."

On cross-examination, this witness testified:

"*Q.* How long was it after that you went by the Hamilton house?

"*A.* I can't tell exactly, a couple of days, about.

"*Q.* Could you tell how recently the Leffonier house had been burned?

"*A.* Well, there was some— There was smoke there yet; it was still burning. There was smoke in some of the logs there, some in the stumps. I have been to the Leffonier place. I was past there before the fire."

This witness also testified to the spreading of the fire.

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After verdict for plaintiff, a motion was made for a new trial upon the ground, among others, that inasmuch as by affidavits in support of the motion it clearly appeared that plaintiff's property was destroyed on the night of July 27th, and Mainville fixed the date of his conversation with defendant's sectionmen on August 1st or 2d, it was evident that the fire he testified about could not have caused plaintiff's injury. The motion was denied by the learned circuit judge, upon the ground that the other testimony given by Mainville made it clear that plaintiff's house was destroyed after his conversation with the sectionmen, and that therefore he was mistaken in fixing the date. We think this ruling correct. As pointed out by the trial judge, this discrepancy was urged upon the jury by defendant's counsel at the trial, and was doubtless given due consideration.

Upon the trial, defendant gave evidence tending to show that it had given positive orders to its employés to set no fires upon its right of way during the dry season. Assuming the truth of this testimony (and it need not be questioned), it was claimed by defendant in the court below, and it is urged here, that defendant was entitled to have a verdict directed in its favor, for the reason that, even if the fires were set by the sectionmen, they were set without authority, and therefore the defendant would not be liable. This view is not supported by authority in Michigan. If the sectionmen, in direct violation of the orders of defendant, set the fires in the course of their employment in clearing up defendant's right of way, defendant would still be liable. *Fitzsimmons* v. *Railway Co.*, 98 Mich. 257 (57 N. W. 127). See, also, *Cosgrove* v. *Ogden*, 49 N. Y. 255 (10 Am. Rep. 361); *Ellegard* v. *Ackland*, 43 Minn. 352 (45 N. W. 715).

Other errors are assigned which require no discussion.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

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H. J. REEDY CO. *v.* CAMERON.

1. EVIDENCE—SALES—RECOUPMENT FOR BREACH OF WARRANTY.
   In an action for the price of an elevator and motor furnished to defendants who claimed that it did not operate properly, and was worn and old, plaintiff claiming that the motor was new and that if it failed to work the fault lay in improper operation, an expert witness' opinion that it was properly operated by defendants' servants was material.

2. SAME—EXPERT AND OPINION TESTIMONY—ELECTRICAL MACHINERY.
   An electrician of experience, who had seen the electric motor operated in connection with an elevator to which it furnished power, at twenty or thirty different times, was qualified to express an opinion as to whether it was properly operated.

3. SAME—OPINION TESTIMONY—WITNESSES—APPEAL AND ERROR.
   It was error to exclude from the consideration of the jury, an answer of defendants' expert that the motor was old, worn-out and second-hand, and the error was not cured by the fact that similar testimony of the witness appeared in another part of the record, since the action of the court might have been intended to apply to the other evidence.

4. SALES—WARRANTY—DEFECTIVE MACHINERY.
   Evidence of defendants, in an action for the purchase price of an elevator and electric motor, that frequent repairs were required, that the motor was old and often failed to work, that the parts were worn, and that its insulation was imperfect, presented a sufficient showing to raise an issue of fact as to the breach of a warranty of material and workmanship.

5. EVIDENCE—IMPEACHMENT OF WITNESS.
   Letters tending to contradict the testimony of plaintiff's president, that the motor was new, first-class and the plaintiff had never been called upon to make repairs, should not have been excluded.

6. DAMAGES—VALUE—EVIDENCE—CHARGE TO JURY.
   Although defendants' witnesses testified that a motor furnished under a contract with plaintiff was defective and worthless, and there was no evidence of value except the

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value as claimed by plaintiff's witnesses, and the fact that defendant made use of and retained the motor, the trial judge erred in charging the jury as to defendants' claim of recoupment that they must, under the evidence, find it was worthless, or of the value shown by plaintiff's testimony.

Error to Ingham; Wiest, J. Submitted April 8, 1910. (Docket No. 49.) Decided December 22, 1910.

Assumpsit by the H. J. Reedy Company, an Ohio corporation, against Basil C. Cameron and Frank N. Arbaugh, on a contract for the sale and installment of an elevator. A judgment for plaintiff is reviewed by defendants on writ of error. Reversed.

Gardner & Hood, for appellants.

Raudabaugh & Person, for appellee.

MCALVAY, J. Plaintiff recovered a judgment against defendants in an action of assumpsit for a balance claimed to be due under a written contract entered into between the parties, whereby plaintiff agreed to furnish, erect, and install for defendants an electric passenger and freight elevator in the building in the city of Lansing occupied by defendants in their business of conducting a department store, for a consideration of $2,000, to be paid, one-third upon arrival of material, one-third upon completion, and one-third 30 days after completion and acceptance.

There is no dispute about the terms of the contract, nor that there remains a balance unpaid of $153.83. The dispute in the case arises on the claim of defendants, under their notice given with the plea, that although plaintiff agreed and guaranteed every part of this electric elevator in all its parts to be of first-class material, and erected in a workmanlike manner, and that its lifting capacity should be 2,000 pounds, yet the electric motor was not new or of first-class material when installed, nor the work or installation as agreed; but that the motor was second-hand and

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worthless, and that the lifting capacity of the elevator was about 1,000 to 1,500 pounds, and that from the time it was put in it was, without fault of defendants, out of commission much of the time to the damage of defendants. This notice raised the issue which was tried in the case. Defendants upon the trial offered proof tending to show that this elevator, by reason of being operated by a second-hand electric motor, was not installed according to the contract and was frequently out of commission, sometimes for several days, requiring the employment of electricians to make repairs at large expense. Plaintiff claimed that this motor was new and first-class in every respect, and the trouble was caused by the careless and ignorant operation of the elevator by defendants' employés.

The case turns upon the quality and condition of the motor furnished by plaintiff at the time of its installation.

Defendants have brought the case here for review, asking for a reversal on account of errors committed during the trial.

We will first consider assignments of error relative to the admission or exclusion of evidence. The record shows that defendants' witness, Cable, an electrician, saw this elevator in operation at least two or three dozen times, and had examined the motor when it was being repaired. Several errors are claimed to have been made in excluding his testimony. On examination, we find that this testimony relative to the kind of motor this was, its condition, and his opinion that it was second-hand was finally admitted. He had qualified sufficiently to give his opinion upon that question. He was asked later:

"From the way you saw the machine operated the different times you were there, and what you saw of the machine or motor, and the elevator, what could you say as to whether it was or was not properly operated?"

The witness was not allowed to answer.

This elevator was operated by the power generated by the motor in question. The witness was an electrician. The question was directed to the method of operating this

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motor. The power was controlled by the man who ran the elevator, and whether it was properly applied and cut off was a material question in the case. The witness should have been allowed to answer the question. Plaintiff contended that the reason that the elevator did not work was because of careless operating by ignorant employés. An expert, who had observed this operation of an electric motor three dozen times, was qualified to give an opinion as to whether it was done carefully or otherwise, and the testimony was material in view of the cross-examination which had just preceded it. The court was in error in excluding this testimony.

The error relied upon relative to striking out an answer by defendants' expert witness, Slaughter, where he says: "It was an old, worn-out, second-hand motor," requires consideration. The testimony of this witness was taken by deposition. The record shows that the part in which the above sentence occurs was re-offered after part of the deposition had been read. This witness was thoroughly acquainted with this motor, having repaired it five or six times. He gave in detail the condition of the motor, explaining what its defects were, what conditions he found in it which showed defective insulation, and old defects covered with plaster of paris, paint, and varnish. What the original objection was, or the reason for striking out the above sentence, does not appear. It is argued that it could not be prejudicial, because a like statement appeared earlier, without objection, in his deposition. From this record, we cannot say that in striking out this answer, it was not intended to strike out the other. If the court was correct, that would follow logically. A fair inference is that it was so intended. Even if it were not, it was a material and proper part of the answer to a question relative to the judgment of witness upon the value of the motor furnished. It was error to strike it out.

In this case, plaintiff admits that defendants were entitled to show: (*a*) the defect or defects, if any; (*b*) the

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occasions and length of time when the elevator was out of repair; (c) the repairs necessary to put it in running order, and insists that the first proposition was not proved.

The testimony of the expert witnesses above discussed tended to prove the first of these contentions, and tended to show that these defects existed at the time of the installation of the elevator. There was sufficient warrant for its submission to the jury. Such facts could be shown by the necessity for repairs to the motor soon after it was installed, the condition of its parts when they were removed, and the frequency of repairs required, based upon the condition of the motor. No expert on the part of defendants examined this motor when it was put in, and the claimed defects were latent.

Some letters, written by plaintiff to its installing agent, were offered by defendants and excluded. There were other letters offered which had been written to plaintiff by the manufacturer of this electric motor in answer to letters written to it by plaintiff. These last-mentioned letters having been properly demanded were not produced. All of these letters were first referred to and identified by Mr. Reedy, president of plaintiff company, on his cross-examination. He had testified that the motor was new and first-class; that they had never been called upon to make any repairs, and as far as he personally knew, the elevator had not been out of repair since its installation. On cross-examination, he admitted that bills for repairs to the amount of about $80 or $100 had been sent to plaintiff by defendants, and allowed.

In Exhibit E was the statement:

"Also have him accept the elevator; we do not want any come-backs."

In Exhibit H was the following postscript:

"Be sure to get letter of acceptance of elevator before you leave."

In Exhibit F appears:

"And if they do not sign it [meaning letter of accept-

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ance], take part of their machine apart so they cannot run it, and until they pay you the balance, keep the elevator shut down."

Exhibit G is the blank acceptance referred to.

All of the electric company's letters were offered to show that plaintiff had knowledge of repairs made on the motor, of claims that it was a second-hand motor, and that plaintiff was contemplating sending a man from the electric company to Lansing to examine or repair it. These letters were admissible for purposes of cross-examination of the witness Reedy, as bearing upon his credibility or to rebut his statements above given. It was error to exclude them.

Errors are assigned upon certain portions of the charge, wherein the court said:

"If the motor was not worthless, then it was of the value of $387, because there is no evidence showing any value between $387 and nothing."

The substance of this charge was repeated several times. The court also charged:

"There is no middle ground. If you are not able to say from the evidence in this case that the motor was worthless, then you come to the other evidence in the case relating to its value as given by the plaintiff."

The court was in error in so charging the jury. Although it is true that no witness on the part of defendants gave the value of the motor at the time it was installed, in dollars and cents, and one or two witnesses testified that it was worthless at the time the repairs were made, the value of the motor at its installation was, under all the evidence, a question of fact for the jury. It had been retained and used by defendants. All of the testimony as to its condition and the claimed necessity for the repairs made upon it was before the jury. The court had already charged them correctly and repeatedly that if the motor was second-hand, yet defendants, by keeping it, must pay what it was worth at the time of installation. The error

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consisted, as above shown, in later restricting the jury to a finding of the full value, as claimed by plaintiff, or of no value at all, taking from them the right to find from this record its actual value.

Other claimed errors do not require discussion.

The judgment is reversed, and a new trial granted.

MOORE, BROOKE, BLAIR, and STONE, JJ., concurred.

COON *v.* COON.

1. DIVORCE—SEPARATE MAINTENANCE—DISCRETION.
   In proceedings for divorce, in which both parties pray for relief, and the wife asks for separate maintenance, the form of decree rests in the sound discretion of the court. Act No. 135, Pub. Acts 1905, as amended by Act No. 324, Pub. Acts 1907.

2. SAME—PUBLIC POLICY.
   It is the settled rule in this State to grant an absolute divorce, instead of separate maintenance, for reasons of public policy.

3. SAME—MOTIONS—WITHDRAWAL OF CROSS-BILL.
   A wife, defendant in divorce proceedings, who has filed a cross-bill praying for separate maintenance, may, on motion made after the court has announced its determination but before the entry of decree, dismiss her cross-bill, unless the complainant or the public has some legal interest which would be injured by the action.

4. SAME.
   And where the evidence showed that the wife had just grounds to complain, but desired not to have a divorce, and the complainant failed to sustain his charge of extreme cruelty, a decree should be made dismissing his bill, after a motion by defendant to withdraw her cross-bill.

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Appeal from Wayne; Murfin, J. Submitted October 20, 1910. (Docket No. 94.) Decided December 22, 1910.

Bill by Charles W. Coon against Jennie Coon for divorce. Defendant filed a cross-bill praying for separate maintenance. From a decree granting defendant an absolute divorce, both parties appeal. Reversed and bill dismissed.

James Swan, for complainant.

Hunt & Altland, for defendant.

BLAIR, J. The bill of complaint filed in this cause alleges extreme cruelty, and prays for an absolute divorce. The answer, in the nature of a cross-bill, alleges extreme cruelty on the part of complainant, that he has failed to live and cohabit with her for two years, and has failed to provide a suitable maintenance for her, sets forth in detail the property owned by the complainant, and asks for separate maintenance. The answer to the cross-bill denies the allegations thereof.

During the progress of the trial, the defendant filed an amendment to the cross-bill, and alleged that during the year 1909 the complainant was guilty of extreme cruelty towards the defendant, in that he wickedly, cruelly, and wantonly associated himself with one Lillian E. Burke, a widow, then unmarried; that he escorted her to various places in the city of Detroit, and alleges that on the 7th day of July, 1909, he was guilty of improper relations with the said Lillian E. Burke, in the premises 862 Grand River avenue, and alleged that he was guilty in divers other ways and in various other places in the city of Detroit of improper relations with the said Lillian E. Burke during the year 1909. On the 2d day of December, 1909, an *ex parte* order was entered allowing solicitors for the defendant the sum of $375 as solicitors' fees, and on the 6th day of December appeal by complainant was taken from said order.

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The taking of testimony was completed November 17th, and, after a brief intermission, the court announced as his conclusions therefrom that: Complainant had failed to prove the charge in his bill of complaint; that defendant had not sufficiently proved the charge in her amended cross-bill, which, in effect, alleged adultery; that defendant had sustained the charge in her cross-bill alleging extreme cruelty; that defendant must be awarded and accept a decree for absolute divorce; that the question of alimony would be considered subsequently. Further consideration of the case was adjourned to November 22d, on which date the defendant made a motion for an order dismissing the cross-bill feature of her answer without prejudice. On November 30th the court filed an opinion denying the motion to dismiss the cross-bill. On the 2d day of March, 1910, a decree was entered, which decreed an absolute divorce between the parties. From this decree both parties appeal.

The reasons of the court for granting an absolute divorce instead of separate support and maintenance against defendant's protest, were that it is the settled policy of this State, as announced by this court in *Burlage* v. *Burlage*, 65 Mich. 624 (32 N. W. 866), to grant absolute divorces "on grounds of public policy to prevent the mischief arising from turning out into the world, in enforced celibacy, persons who are neither married nor unmarried." The motion for leave to withdraw the cross-bill was denied, substantially, for the reason that it came too late. The court said, in part:

"If parties are to be permitted to litigate their differences to a conclusion, so that nothing remains to be done but the final formal signing of the decree, and then because the decree ordered by the court is not satisfactory, withdraw their suit, and render nugatory all that has gone before, it makes court procedure at best at the whim of litigants, if not an idle mockery. And especially are these conclusions applicable, as already pointed out, in a divorce case. *Winans* v. *Winans*, 124 N. Y. 140 (26 N. E. 293). It is a well-recognized rule of practice on the law

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side of the court, for which there is ample precedent, that, in the absence of a set-off or counterclaim, the plaintiff may, at any time before verdict, discontinue his suit; but no rule, statute, or opinion can be found in any jurisdiction which authorizes such a discontinuance after verdict and before judgment. By analogy, why does not the same rule prevail in equity? The question now before the court would not have been presented had the cross-complainant withdrawn her cross-bill before the opinion of the court was announced. To grant her leave to take this step because she does not like the opinion of the court, or to encourage any such practice, would be to tolerate and encourage trifling with the courts, something which obviously is not to be thought of."

The form of decree which shall be entered in cases like the present rests in the sound discretion of the circuit court in the first instance, and, upon appeal, in the sound discretion of this court. *Horning* v. *Horning*, 162 Mich. 130 (127 N. W. 275).

Our previous decisions as to the policy which should govern the decision of the courts fully support the determination of the circuit court. *Burlage* v. *Burlage*, 65 Mich. 624 (32 N. W. 866); *Sullivan* v. *Sullivan*, 112 Mich. 674 (71 N. W. 487); *Utley* v. *Utley*, 155 Mich. 258 (118 N. W. 932); *Horning* v. *Horning*, *supra*. In 1905 the legislature adopted an amendatory act taking from the courts the discretion to grant an absolute divorce "where the same is not asked for by the complainant in the bill of complaint filed therein or by the defendant on a cross-bill." Act No. 135, Pub. Acts 1905. In 1907, however, the legislature again amended the section, substantially recommitting the form of the decree to the discretion of the courts, and, necessarily, in accordance with the policy governing their discretion theretofore announced. Act No. 324, Pub. Acts 1907. The facts that defendant did not initiate the litigation, but was compelled to come into court to defend herself, and was free from blame, do not affect this question. When she filed her cross-bill, she submitted her rights to the court to the same extent as if she had filed an original bill, and, if the court was

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right in denying her motion to dismiss the cross-bill, we are of the opinion that he entered the proper form of decree.

The defendant urges "that under the facts as disclosed by this record the defendant was legally and equitably entitled to withdraw her cross-bill," and cites in support of her position *Seymour* v. *Jerome*, Walk. Ch. (Mich.) 356; *Watt* v. *Crawford*, 11 Paige (N. Y.), 472; Jennison on Chancery Practice, p. 103; *Clutton* v. *Clutton*, 106 Mich. 690 (64 N. W. 744); *Pullman's Palace Car Co.* v. *Transportation Co.*, 171 U. S. 138 (18 Sup. Ct. 808); *Stover* v. *Stover*, 7 Idaho, 185 (61 Pac. 462); *Adams* v. *Adams*, 57 Misc. Rep. 150 (106 N. Y. Supp. 1064); *Milliman* v. *Milliman*, 45 Colo. 291 (101 Pac. 58, 22 L. R. A. [N. S.] 999, 132 Am. St. Rep. 181). See, also, *Moore* v. *Moore* (Sup.), 22 N. Y. Supp. 451; *Id.* 138 N. Y. 679 (34 N. E. 373); 14 Cyc. p. 701; 7 Enc. Pl. & Prac. p. 116. We think the general rule to be deduced from the authorities is that in divorce proceedings the complaining party may dismiss his suit at any time before interlocutory or final decree, in the absence of any legal interest on the part of the defendant or of the State to the contrary. It was held by the court of appeals of New York in *Winans* v. *Winans*, 124 N. Y. 140 (26 N. E. 293), that:

"The rights of the party to the record are not alone to be considered, the public is regarded as a party, and must be treated as such by the court."

Our statutes provide for the representation of the public interest by the prosecuting attorney where there are children under fourteen years of age, and, since the sanctity of the marriage relation underlies our civilization, we have no doubt that the interests of the State should be considered. In *Winans* v. *Winans* the alleged marriage was denied by defendant and the issue involved a determination of the legitimacy of a child. In the subsequent case, however, of *Moore* v. *Moore*, 138 N. Y. 679 (34 N.

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E. 373), the court affirmed *Moore* v. *Moore* (Sup.), 22 N. Y. Supp. 451, where it was held that the public has no such interest in an action for divorce where no issue is raised as to the legality of the marriage as will require the court, in the exercise of its discretion, to deny plaintiff's application for a discontinuance. In the instant case we do not perceive how the interests of the State or the legal rights of the complainant would be prejudiced by the granting of defendant's motion. Certainly it is not for the interest of the State that the guilty husband, who has violated his marriage covenant, should obtain by indirection a divorce from his innocent wife, who is willing to condone his offense and renew marital relations. In this respect we concur in the reasoning of the Supreme Court in *Adams* v. *Adams*, 57 Misc. Rep. 150 (106 N. Y. Supp. 1064).

In our opinion the defendant should have been permitted to dismiss her cross-bill and a decree entered dismissing complainant's bill of complaint. A decree may be entered in accordance with this opinion, the subject of expenses and allowances to be considered on the settlement of the decree, unless counsel agree thereto.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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STEBE *v.* STEBE.

APPEAL AND ERROR—WAIVER—ESTOPPEL BY ACQUIESCENCE—DISMISSAL.

The marriage of appellant, in proceedings for divorce, waives his right to review a decree granting to his wife a divorce on the ground of extreme cruelty; since one cannot secure a benefit under a judgment and then appeal from it, when the effect of his appeal may be to annul it, unless his rights could not be affected by the reversal of the judgment.

Appeal from Muskegon; Sessions, J. Submitted November 18, 1910. (Docket No. 167.) Decided December 22, 1910.

Bill by Catherine Stebe against Charles C. Stebe for divorce. From a decree for complainant, defendant appeals. On motion to dismiss the appeal, considered with argument on the merits. Motion granted.

Alex. Sutherland, for complainant.

C. G. Turner, for defendant.

BIRD, C. J. Complainant filed her bill of complaint in the Muskegon circuit court, charging defendant with extreme cruelty and praying for a decree of divorce, alimony, and custody of their infant daughter, Louella. The defendant answered, denying the material allegations of the bill, charged complainant with cruelty, and prayed for a decree of divorce and claimed for his answer the benefit of a cross-bill. A hearing was had upon pleadings and proofs in open court. The trial court, after a somewhat extended hearing, gave complainant a decree of divorce, awarded her the custody of the child, and provided that the defendant should make monthly payments for the care and support of the child until she attained the

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age of 16 years. From this decree the defendant has appealed to this court. Subsequent to and since this appeal has been pending, and on the 8th day of February, 1910, the defendant remarried. Complainant thereupon made a motion to dismiss the appeal for this and other reasons. With this motion appears a certified copy of the license and certificate of such marriage. The motion was served upon defendant and was resisted by his counsel in this court. No denial was entered by him or his counsel of the fact of such remarriage. The motion was denied for reasons unnecessary to state, and the case has been submitted to us upon the merits.

With the uncontradicted proof of defendant's remarriage on file in this court, we think he is in no position to insist upon having his appeal further considered by this court. By entering into the marriage contract again, while his appeal was pending, he has voluntarily accepted and acquiesced in the decree made by the trial court. He ought not to be permitted to take advantage of the freedom from the bonds of matrimony which the decree grants him, and at the same time complain that such decree was wrong and against his just rights.

This question was well considered in the case of *Tyler* v. *Shea*, 4 N. D. 377 (61 N. W. 468, 50 Am. St. Rep. 660), and the rule is there stated to be:

"That one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute and cannot possibly be affected by the reversal of the judgment."

The case of *Rariden* v. *Rariden*, 33 Ind. App. 284 (70 N. E. 398, 104 Am. St. Rep. 252), was a divorce case in which the defendant was granted a decree of divorce on his cross-bill. He appealed from the decree awarding the complainant alimony. Subsequently the defendant remarried, and the court held he had thereby waived his appeal. To the same effect, see *Stephens* v. *Stephens*, 51 Ind. 542.

We think the same must be said of the defendant in this

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case, that he has waived his appeal by his remarriage. This holding is supported by the recent case of *Clairview Park Improvement Co.* v. *Railway*[1] (129 N. W. 353).

The appeal is dismissed, with costs to the complainant.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

MOORMAN *v.* MOORMAN.

APPEAL AND ERROR — DISMISSAL OF APPEAL — ACCEPTANCE OF BENEFITS UNDER DECREE.

On motion to dismiss, an appeal will be considered as waived by a defendant, claiming relief by cross-bill in proceedings for divorce instituted by her husband, where she causes the decree of the trial court awarding to her, subject to a mortgage, certain real estate, as alimony, to be recorded in the office of the register of deeds, and gives a new mortgage upon the premises for a larger amount than the original mortgage secured.

Appeal from Kent; Connine, J., presiding. Submitted October 26, 1910. (Docket No. 119.) Decided December 22, 1910.

Bill by Hiram Moorman against Julia E. Moorman for divorce. Defendant filed a cross-bill and was awarded a divorce and alimony. From the award of alimony, defendant appeals. On motion to dismiss the appeal at a hearing upon the merits: granted.

Hatch, McAllister & Raymond, for complainant.

Smedley, Hall & Freeland, for defendant.

[1] Not officially reported. Motion for rehearing pending.

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BIRD, C. J. The complainant filed his bill of complaint in the Kent county circuit court in chancery, praying for a decree of divorce from the defendant on the ground of extreme cruelty. The defendant answered, denying the acts of extreme cruelty alleged in the bill of complaint, and charged complainant with certain acts of cruelty, and asked for affirmative relief in the form of a separate maintenance. After a full hearing had upon the merits of the case, the trial court dismissed complainant's bill, and found that the material allegations of defendant's cross-bill were true, and, notwithstanding she had asked only for a separate maintenance, the court exercised his right under the statute, and gave her an absolute divorce. As permanent alimony, the court awarded her the home which they occupied in Grand Rapids and to which complainant had title, estimated to be worth from $4,000 to $6,000, together with all the furniture in the house. The home was encumbered for $2,000. A certified copy of the decree was duly recorded in the office of the register of deeds. The old mortgage was refunded and increased by her giving a new mortgage for $2,600. She made some repairs to the house, and made some additions to the furniture to enable her to rent portions of the house advantageously. Subsequently she appealed from that part of the decree awarding her permanent alimony, and asked this court to increase the allowance.

Complainant's solicitors refused to take part in settling the case before the trial court, and, after the appeal was perfected, they made a motion in this court to dismiss the appeal because the defendant had accepted and acquiesced in the decree by accepting the title to the home and household furniture, and by accepting the costs of the proceedings. The motion was resisted by defendant and a showing made in opposition to it in which it is conceded that a certified copy of the decree was recorded in the office of the register of deeds; that a deed was made by complainant of the home and delivered to the mortgagee in the new mortgage; that she now has possession of both the

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home and furniture, and that the costs of the proceedings were accepted by her solicitor, who conducted her case in the trial court. In the showing, defendant seeks to avoid the effect of these acts by claiming that she had to refund and increase the mortgage to prevent foreclosure of the mortgage and prevent a sale of the premises for taxes; that she did not ask for or accept any deed of the premises, but the same was requested and accepted by the new mortgagee; that she has no other or different possession now than before the decree; and that her solicitor accepted the costs of the suit, but that she has never received them. This court reserved its determination of the motion until the case should be heard upon its merits, and now that question is before us as well as the merits of the appeal.

Passing over the acts of defendant which are in dispute, and considering only the act about which there is no dispute, viz., the placing of a certified copy of the decree on record in the office of the register of deeds, we think she has so far accepted the benefits of the decree as to estop her from further prosecuting her appeal. The general rule in such cases is:

"That one cannot accept or secure a benefit under a judgment and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by reversal of the judgment." *Tyler* v. *Shea*, 4 N. D. 377 (61 N. W. 468, 50 Am. St. Rep. 660).

When the defendant placed the certified copy of the decree of record, she accepted the title to the real estate. She exercised acts of ownership by making repairs upon the house and by mortgaging it, and there would now seem to be no good reason why she could not dispose of it by sale if she chose to do so. After she has accepted the specific thing which was decreed to her as permanent alimony, she is in no position to complain in this court that the trial court did not do justice by her. Suppose this court, in considering the merits of her appeal, should conclude that it would make a different award of perma-

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nent alimony by giving her a monthly allowance and making it a lien upon the home if not paid, how could the order of this court be carried into effect and how could complainant be reinvested with the title to the home, especially if she had seen fit to dispose of it. It is on account of considerations like these that the rule exists.

A very similar case is reported in *Waddingham* v. *Waddingham*, 27 Mo. App. 596. The wife was given a decree of divorce and permanent alimony of $60 per month. She appealed from the allowance of alimony, and asked the appellate court to increase it. Pending the appeal she enforced the payment of the monthly allowance. This was brought to the attention of the appellate court, and it was held that she had waived her appeal by accepting the monthly allowance. To the same effect is the case of *Williams* v. *Williams*, 6 N. D. 269 (69 N. W. 47). See, also, *Stebe* v. *Stebe*, *ante*, 650 (129 N. W. 356), and *Clairview Park Improvement Co.* v. *Railway*[1] (129 N. W. 353).

The motion to dismiss the appeal is granted, with costs to complainant.

OSTRANDER, HOOKER, MOORE, and STONE, JJ., concurred.

HINDMAN v. FRIEDRICH.

APPEAL AND ERROR — TRIAL BY COURT — FINDINGS OF FACT AND LAW — QUESTIONS REVIEWABLE.

Findings of fact made by the trial court, without a jury, upon contradictory evidence, are not reviewable in the Supreme Court; it is only where there is a total want of evidence or where the finding is contrary to the undisputed evidence that the findings of fact will be reviewed.

[1] Not officially reported. Motion for rehearing pending.

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Error to Kent; McDonald, J. Submitted October 26, 1910. (Docket No. 117.) Decided December 22, 1910.

Assumpsit by Ambrose C. Hindman against Otto Friedrich for rent due. From a judgment for defendant, plaintiff appealed to the circuit court. A judgment for plaintiff, on a trial by the court without a jury, is reviewed by defendant on writ of error. Affirmed.

Adsit & Danhof, for appellant.

A. C. Hindman, in pro. per.

MOORE, J. This case was commenced in justice's court to recover rent which plaintiff claimed was due him. An appeal was taken to the circuit court, where it was tried before the judge, who made findings of fact and of law.

"Fact.

"(1) In December, 1907, defendant rented from plaintiff certain premises in Grand Rapids for residence purposes at eighteen dollars per month, payable monthly in advance, for no specified term. Defendant moved into the premises December 15, 1907, and vacated June 15, 1908.

"(2) About March, 1908, defendant complained that the property was not worth the rent agreed upon, and it was then reduced to fifteen dollars per month.

"(3) There was no agreement between the parties that the landlord should make repairs.

"(4) Defendant paid all the rent due each month, up to June 1, 1908, but paid no rent after that time.

"(5) June 10, 1908, plaintiff received the following letter from defendant: 'Enclosed please find check for $7.50, for rent from June 1st to 15th. I'll vacate your house on the 15th inst.' On June 1st, $15 was due in advance for the month of June. Plaintiff returned the check stating that it was not enough. Defendant vacated the premises June 15th, and again sent the same check and also the keys. Plaintiff kept the keys, but again returned the check.

"(6) Plaintiff was not able to rent the house and it

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stood vacant until September, 1908, when it was rented to and occupied by the present tenant in the same condition in which defendant left it.

"(7) When defendant moved in, the premises were in a tenantable condition and reasonably fit for the purposes for which they were rented.

"(8) About the middle of January, defendant noticed steam and water coming from the ground in the back yard, from the sewer. This he reported to plaintiff, who promised to have the cesspool cleaned out. No solid substances came to the surface, just liquids and some toilet paper, and both parties then supposed that this trouble was caused by the backing up from the cesspool into the sewer and coming up in this way, through the hand-hole vent or running trap. This steam and water seemed to come up at about the location of this trap in the yard.

"(9) This caused some odor that came into the house when the dining room windows were open and the wind happened to be from that direction. There was no difficulty in using the water and sewerage system in the house, and no odors came back into the house through the plumbing or sewerage system.

"(10) About May 20th, defendant's wife called the health department, and had an inspector look into the matter, and this inspector served notice on plaintiff to have foul cesspool cleaned. Plaintiff immediately upon receiving such notice gave an order to the inspector for the health department to clean the cesspool. Such work is a part of the health department's duties. Plaintiff reported to defendant that he had given the order, and also told defendant to look after it, and see that the said health department did the work promptly. The city did not clean the cesspool until after the defendant moved out and the present tenant moved in, because the city was then having litigation, and injunction proceedings were then pending about the place for the disposal of night soil and the city was not doing any vault or cesspool cleaning for a time. This work was not permitted to be done by any other than the licensed scavengers, through orders given directly to the board of health for the work.

"(11) This sewer trouble continued the same after the cesspool was cleaned and up to June, 1909, a year after defendant moved out, when the present tenant got a plumber to dig up the sewer in the yard at the place of

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the show of the coming up of the water and at this vent or house trap, and he then found that the difficulty was a broken joint of sewer tile next to the trap, and a partial stoppage from the sticks and stone, etc., in the trap. This plumber cleaned out the trap and replaced the broken tile which fully repaired the trouble.

"(12) At the various times this matter was talked about between the parties before defendant vacated, neither party knew that the trouble originated from a broken sewer tile and a partially clogged trap. At the time defendant vacated the premises, neither party was aware that the trouble originated in this way.

"(13) The house did not become untenantable or unfit for habitation because of this trouble or defect. The house was tenantable and fit for habitation during all of the time occupied by defendant and was so at the time he vacated.

"(14) The defects in the sewer did not exist at the time defendant moved into the premises.

"(15) Defendant did not vacate said premises because they were untenantable, but primarily because plaintiff refused to furnish screens.

"(16) When this cause came on for trial in justice's court, defendant paid into court as a tender $7.50, but did not pay or tender any amount of costs. Plaintiff had at that time paid the costs in justice's court, $2.50. This tender was not sufficient. Even under defendant's admitted liability it should have been $10 and interest on $7.50. It is also not sufficient, because the court finds plaintiff entitled to the full amount claimed, $20 and costs.

"Law.

"(1) Plaintiff was under no obligations to make repairs.

"(2) Plaintiff is entitled to judgment for $20 damages for one and a third months, at $15 per month, this is one-third of the month, up to the receipt of the letter notifying him that the premises would be vacated on June 15th, and for thirty days after said notice."

The errors complained of are stated by counsel as follows:

"That the testimony in the case does not support the findings of the court in the following particulars: In finding that 'on June 1st, $15 was due in advance for month of June;' that 'when defendant moved in, the premises were in a tenantable condition and reasonably fit for the

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purposes for which they were rented;' that 'no solid substances came to the surface, just liquids and some toilet paper, and both parties then supposed that this trouble was caused by the backing up from the cesspool into the sewer and coming up in this way, through the handhole vent, or running trap;' that 'at the time defendant vacated the premises, neither party was aware that the trouble originated in this way,' meaning from a broken sewer tile and a partially clogged trap; that 'the house did not become untenantable or unfit for habitation because of this trouble or defect;' that 'the house was tenantable and fit for habitation during all of the time occupied by defendant, and was so at the time he vacated;' that 'the defects in the sewer did not exist at the time defendant moved into the premises;' that 'defendant did not vacate said premises because they were untenantable, but primarily because plaintiff refused to furnish screens;' that 'the tender made by defendant of $7.50 into justice's court was not sufficient;' that 'plaintiff was under no obligation to make repairs;' that 'plaintiff is entitled to a judgment of $20.'"

The testimony offered upon the part of the plaintiff in most essentials differs widely from that offered on the part of defendant.

In the case of *Cragin* v. *Gardner*, 64 Mich. 399 (31 N. W. 206), it was said:

"It is well settled that we cannot, in reviewing a case-made, weigh evidence, determine facts, or review the findings of the court below upon questions of fact. *Heimbach* v. *Weinberg*, 18 Mich. 48; *In re Wisner's Estate*, 20 Mich. 128; *Schmidt* v. *Miller*, 22 Mich. 278; *Walrath* v. *Campbell*, 28 Mich. 123; *Earle* v. *Insurance Co.*, 29 Mich. 414; *City of Grand Rapids* v. *Whittlesey*, 32 Mich. 192; *Peabody* v. *McAvoy*, 23 Mich. 526; *Tuxbury* v. *French*, 39 Mich. 190; *Chatterton* v. *Parrott*, 46 Mich. 432 (9 N. W. 482); *Wertin* v. *Crocker*, 47 Mich. 642 (6 N. W. 683). It is only where there is a total want of evidence, or where the finding is contrary to the undisputed evidence, that we can overturn the facts found by the court. In this case there was testimony to support each fact found by the circuit judge, and the facts so found support the judgment rendered by him."

In *Lamoreaux* v. *Creveling*, 103 Mich. 501 (61 N. W.

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783), Justice MONTGOMERY, speaking for the court, said:

"There being testimony in the case tending to support these findings of fact, we are not authorized to go into the testimony, to ascertain whether we would reach the same result upon the facts; and, as the finding is conclusive of the plaintiff's rights, it is unnecessary to discuss the other questions involved."

These cases we think are controlling of the one before us.

Judgment is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

WEAVER *v.* MURRAY.

1. EVIDENCE—MATERIALITY—CONSPIRACY.
   In an action for a sum due under a contract, which defendant admitted, but claimed had been compromised by the making of a subsequent agreement in place thereof, evidence of other litigation of the defendant, and garnishment proceedings in this action affecting the other cases, was properly excluded as immaterial, although offered to show that the motive of plaintiff was fraudulent.

2. TRIAL—CONDUCT OF COURT.
   It was not improper conduct of the trial court, upon cross-examination of a witness, after an objection made by counsel, and, on referring back to a previous question and answer, to say, "Of course, he denied it," when it is apparent that the court merely asked for information and referred to the effect of the question and answer.

3. CONTRACTS—INSTRUCTIONS TO JURY—TRIAL—COMPROMISE AND SETTLEMENT.
   It was not erroneous to charge the jury that the compromise

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which defendant claimed was made, of plaintiff's admitted claim, must be shown by a preponderance of the evidence, and that the mere fact that defendant did work which was of value, could not be considered as canceling the indebtedness of defendant to plaintiff, unless it was done in pursuance of the alleged compromise.

Error to the superior court of Grand Rapids; Stuart, J. Submitted October 26, 1910. (Docket No. 113.) Decided December 22, 1910.

Assumpsit by Milton S. Weaver against A. Linn Murray upon a contract to pay plaintiff a specified amount. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Maher & Barnard, for appellant.

Richard C. Goodspeed, for appellee.

HOOKER, J. The plaintiff brought an action of assumpsit against the defendant and recovered. Defendant has appealed.

So far as the pleadings show, the action was based upon a settlement and written agreement between them, and a promise by defendant to pay plaintiff $190.43. The defendant pleaded the general issue and a later agreement that the amount should be considered paid, if defendant should succeed in buying up certain notes of the company, together with certain stock held by the payees, at 50 cents on the dollar, said stock to be divided equally between plaintiff, defendant, and one Goodspeed. There was no dispute upon the trial as to indebtedness of $190.43. There was conflicting testimony as to the making and performance of the alleged agreement claimed by the defendant as a payment, and the judge told the jury in his charge that if that agreement was made, the verdict should be for the defendant, and if not shown by a preponderance of the proof, the verdict must be for the plaintiff. The charge was a helpful one, presenting in a clear-

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cut way the vital points, and not embarrassing or befogging the jury by an unnecessary discussion of the evidence or immaterial testimony.

1. **Motion for New Trial.** The court did not err in denying the motion for new trial. We think the verdict has not been shown to be against the weight of evidence, nor do we find evidence of any prejudice in the minds of the jury.

2. **Evidence of Malice.** Counsel offered in evidence certain proceedings in three other cases and a garnishee proceeding in this case. We do not readily find them in the record, except the garnishee proceedings, and counsel has made no reference to the pages where they are to be found. In his brief he says that they were offered to show that this suit was being prosecuted fraudulently, maliciously, and without cause, and claimed a conspiracy existed to defraud and embarrass defendant in collecting claims due him from the company. In offering it counsel said:

"*The Court:* I don't think I would want to go into anything except as to whether that stock was given in payment of this settlement.

"*Mr. Maher:* We have the right to show what the purposes of this suit are, that they were fraudulent and as tending to corroborate the claims that it is so, that the settlement was made, and that notwithstanding the settlement this suit was brought. We propose to show a series of acts on the part of this man and his associates all of which have been for the purpose of defrauding Mr. Murray and preventing him from collecting what was owing to him by the Inner Shoe Tire Company. We do not propose to go into any cases that have not been tried; we propose to go into only the undisposed of matters."

We do not set forth the colloquy at length. It seems to us as obvious as it did to the trial judge that these matters were foreign to the issue, which was a narrow one, and that it was proper to exclude this testimony.

3. **Remark of Court.** Plaintiff had testified that although he received his share of the stock purchased at 50 cents on the dollar, he had at once given it to James Fox

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at the suggestion of Goodspeed. The natural inference was that he did not care to take it. Counsel says that this testimony was well calculated to prejudice the jury and the following occurred on the cross-examination of defendant:

"*Q.* (Mr. Goodspeed to Mr. Murray). You don't remember that Mr. Weaver said that he didn't want that stock; that he hadn't done anything for it?

"*A.* No, sir; he did not say it?

"*Q.* And he wanted to give it to Mr. Goodspeed because Mr. Goodspeed had put the idea through?

"*A.* Never said anything of that kind in my presence.

"*Q.* Were you there when this took place?

"*A.* I was there when my stock was handed to me. I presume Mr. Weaver got his at the same time; it was written off.

"*Q.* You say something of that kind was said?

"*A.* There certainly was not in my presence.

"*Q.* Were you there when Mr. Goodspeed said if he wanted to give it to somebody to give it to James Fox?

"*A.* No, sir.

"*Q.* You were not there then?

"*A.* No, sir.

"*Mr. Maher:* I object to that question as assuming that Goodspeed said it, and ask that the question and answer be stricken out.

"*Mr. Goodspeed:* We may show this was said.

"*The Court:* What is the question? (Last question and answer read.)

"*The Court:* Of course, he denied it.

"*Mr. Goodspeed:* He states he didn't hear any such thing; I think that covers it.

"*The Court:* It may stand.

"*Mr. Maher:* An exception."

It is apparent that the court was asking information as to the question and answer objected to, and not making a statement that, "Of course, he denied it." There was no error in this.

4. **Charge.** The court said:

"Now the transaction that took place in regard to this stock as I have said, if it took place, as the defendant claims and has testified in regard to, if you are satisfied

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of that by a preponderance of the evidence, that would be a defense. But the mere fact that the defendant Murray did work in connection with buying up this stock, bringing it in so it could be divided, I say that mere fact alone would not and could not be considered by you as wiping out this indebtedness between him and Weaver, the plaintiff; the mere fact that he did work that was valuable and that enabled the plaintiff to obtain this stock; that mere fact alone of his getting something valuable could not be considered as an offset or cancellation of this indebtedness without this agreement that the defendant claims Weaver made in regard to it. And the mere fact that Mr. Weaver received a thousand dollars' worth of stock, or any amount of stock, by this agreement of Mr. Goodspeed's, could not be considered as an offset to this claim, unless, as I have said, he agreed to receive it in the way that Mr. Murray has stated. In other words, this money as it appears by this agreement was to be furnished by Goodspeed and Goodspeed was distributing this stock. If it was a present from Goodspeed, it was a present from Goodspeed to each of these men who were running the business and trying to put it upon its feet. He could have kept all this, I suppose; he could have bought up these notes and could have kept it all, but he made the agreement to divide up with the other two in the company, so that that was a gratuity, so to speak, on the part of Goodspeed. But if, in connection with that, Mr. Murray, by reason of Weaver's not going out and helping him, got him to say that he would release him from the indebtedness if he brought that about and take that stock, then I say, if that is made out by a preponderance of the evidence, that would be a defense, but the mere fact alone that he got something valuable for nothing from Goodspeed would not of itself cancel the indebtedness."

We see nothing here justifying a reversal.

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

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BAARS v. TOWNSHIP OF LAKETON.

1. PRINCIPAL AND AGENT — PUBLIC OFFICERS — INTEREST OF AGENT.
   An agent cannot bind his principal in a contract which the agent makes with himself; and the doctrine extends to public officers.

2. PUBLIC OFFICERS—TOWNSHIPS—HIGHWAY COMMISSIONER.
   A highway commissioner cannot recover for services rendered in overseeing the work of his own man and team upon the highway; a contract with himself for such work being unlawful.

3. COSTS—CONSENT TO JUDGMENT—STATUTES.
   A defendant who files a consent to a judgment (3 Comp. Laws, § 10084), for the amount plaintiff is entitled to recover, should be awarded all costs made thereafter.

Error to Muskegon; Sessions, J. Submitted October 20, 1910. (Docket No. 95.) Decided December 22, 1910.

Assumpsit by John Baars against the township of Laketon, for services rendered. Judgment for plaintiff and defendant brings error. Reversed, and judgment for a reduced amount entered.

Alex. Sutherland, for appellant.

Cross, Vanderwerp, Foote & Ross, for appellee.

HOOKER, J. The defendant has appealed from a judgment of $88.15 in favor of the plaintiff; the same having been rendered in circuit court upon a verdict for that amount. Only $13.15 is involved; defendant having offered in writing, under 3 Comp. Laws, § 10084, to allow judgment for $75. The plaintiff is a highway commissioner, and filed a claim for services with the township board. They allowed him compensation at $2 a day, the minimum amount provided by statute, and for a less num-

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ber of days than he claimed to have worked. The amount allowed was $75. He refused to accept this amount, and brought this action. The defendant has appealed.

The contested item appears to be time spent in overseeing the work of his own team and driver only in work upon the highway. It is the contention of defendant's counsel that he is not entitled to pay for such service. The learned circuit judge instructed the jury that he might recover for such service, and left it to the jury to say how much of the time charged it was reasonably necessary to spend. The only question requiring consideration is whether he could lawfully charge for overseeing the work of his own man and team, when no one else was at work. The highway commissioner determined to do certain grading by the day, and teams were employed by him—among others, his own. On some of the days only his own team worked.

The defendant claims that the court erred in submitting these items to the jury, and in declining to decide them himself. It is a well-settled rule that an agent cannot bind his principal in a contract which the agent makes with himself, and we have decided that the doctrine extends to public officers. This was decided in the case of *People, ex rel. Plugger*, v. *Township Board*, 11 Mich. 222. The following cases are in point on the general proposition: *Beaubien* v. *Poupard*, Har. Ch. (Mich.) 206; *Walten* v. *Torrey*, Har. Ch. (Mich.) 259; *Clute* v. *Barron*, 2 Mich. 192; *Dwight* v. *Blackmar*, 2 Mich. 330 (57 Am. Dec. 130); *Moore* v. *Mandlebaum*, 8 Mich. 433; *Flint, etc., R. Co.* v. *Dewey*, 14 Mich. 486, 487; *Hannah* v. *Fife*, 27 Mich. 172; *Powell* v. *Conant*, 33 Mich. 396; *Prince* v. *Clark*, 81 Mich. 170 (45 N. W. 663); *Wilbur* v. *Stoepel*, 82 Mich. 344 (46 N. W. 724, 21 Am. St. Rep. 568); *McNutt* v. *Dix*, 83 Mich. 328 (47 N. W. 212, 10 L. R. A. 660); *Miner* v. *Ice Co.*, 93 Mich. 109 (53 N. W. 218, 17 L. R. A. 412); *Humphrey* v. *Transportation Co.*, 107 Mich. 167 (65 N. W. 13). We are constrained to hold that the plaintiff set his own man and

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team at work unlawfully; and, this being the only occasion for his supervision, we are of the opinion that he is not entitled to compensation for time spent in supervision, and the court should have so instructed the jury. The question seems to us to be within the spirit, if not the letter, of the rule.

As the record shows that the defendant can contest only the excess of the judgment over $75, that amount—*i. e.*, $75—having been allowed and tendered, and no question being raised in the appeal as to that sum, we may enter a judgment for plaintiff in this court for $75, with interest from the time the action was begun, and with costs made before the offer of judgment.

The defendant is entitled to a judgment here for all costs made since the filing of its written offer of judgment.

MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

STUBMAN *v.* MODRACK.

1. DEEDS—DELIVERY—SUFFICIENCY OF EXECUTION.
   Where a decedent executed deeds several years before her death, telling the attorney who prepared them that when she died everything would be all right, and kept them in a safe in which she deposited her will, afterwards executed, and where she told her son to have the deeds recorded after her death, but kept control of them herself, in the safe, no sufficient delivery was shown, although the son placed the instruments on record after her decease.

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2. WITNESSES—EVIDENCE—STATUTES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

Testimony of the son who caused the deeds to be recorded, that deceased directed him to have them placed on record after her death, was competent as to deeds not running to him as grantee or in which he had no interest except as the agent of deceased.

Appeal from Ottawa; Padgham, J. Submitted October 26, 1910. (Docket No. 120.) Decided December 22, 1910.

Bill by Louis Stubman by John Vyn, his next friend, against John Modrack, Mary Modrack, Louis Fischback, and Louis Fischback and William Thieleman, executors of the estate of Ulrika Luhm, deceased, to set aside certain deeds. From a decree dismissing the bill, complainant appeals. Reversed.

Corrie C. Coburn and *Smedley, Hall & Freeland*, for complainant.

Walter I. Lillie and *George A. Farr*, for defendants.

OSTRANDER, J. Ulrika Luhm died August 10, 1908, testate, her last will was probated, and administration of her estate was entered upon. In March, 1892, she executed a deed of real estate. In January, 1902, she executed five deeds of real estate. They are all short-form warranty deeds. After her death and on August 28, 1908, her son, Louis Fischback, caused the deeds to be recorded. Louis Stubman is grantee in two of the deeds, and in the others Louis Fischback, John Modrack, and Mary Modrack, respectively, are the grantees. They are all children or grandchildren of decedent. Complainant seeks a decree setting aside three of the deeds—not those running to himself—his claim being that decedent never delivered them. Whether they were delivered is the question presented, and, with it, the question whether it was competent for Louis Fischback to testify to decedent's directions

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concerning the deeds. At the circuit a decree was entered dismissing the bill.

The history of these deeds is as follows: They were all of them drawn by the attorney for decedent, who also signed them as a witness and executed the notary's certificates. The other witness was the son of the scrivener, himself a lawyer. All of the deeds dated in 1902 were ordered at one time, four of them being dated January 30th, and one January 31st. When they were finished, decedent said, "When I go dead, then everything is all right," or, "Everything is all fixed." They were kept by decedent in a safe in which her will, executed the next month, was also kept. They were found in the safe after her death. Before her death she told her son, Louis Fischback, who worked for, or with, her in her saloon, and who with her ran across them one day in looking for some other paper in the safe:

"Put them back in there. If I should die or something should happen, why you take care of them and have them recorded."

Decedent told others that, in substance, she had disposed of her property. Louis Fischback first took the deeds to the probate judge and later, as has been stated, caused them to be recorded. We have not found a copy of decedent's will in the record. It seems to be agreed that in terms it disposes of all of decedent's property to Louis Fischback and Louis Stubman, in equal shares.

Assuming that Louis Fischback was, as to the deeds not running to himself, the mere agent or trustee of decedent to execute her purpose, it is not clear that his testimony of the directions given him by decedent should be excluded. See *Jenkinson* v. *Brooks*, 119 Mich. 108, 111 (77 N. W. 640). We do not decide the question because we are satisfied that his testimony does not alone, or in connection with all other circumstances disclosed, prove a delivery of the deeds by the decedent. Certainly they were not delivered to Louis Fischback. They were never

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beyond the control of the grantor. It does not appear that the grantees, other than Fischback, knew of the existence of the deeds.

We feel obliged to reverse the decree of the circuit court and to enter here a decree for complainant, with costs of both courts.

BIRD, C. J., and HOOKER, MOORE, and STONE, JJ., concurred.

LARKIN *v.* MODERN WOODMEN OF AMERICA.

1. INSURANCE—FRATERNAL BENEFICIARY ASSOCIATIONS—EXHAUSTION OF REMEDIES WITHIN THE ORGANIZATION.

   A clause in a fraternal benefit insurance policy, providing that no action shall be maintained on the certificate until after the proofs of death have been filed and passed upon by the board of directors, is a valid limitation, and is a condition precedent to the right of action.

2. SAME—OFFICERS—PRINCIPAL AND AGENT—AUTHORITY.

   Under the by-laws of a fraternal beneficiary society, prohibiting any officer or local camp official from waiving the provisions of a policy of insurance, and declaring that the clerk of a local camp is not the agent of the head camp, the clerk of a local camp could not waive the by-laws of the great camp, relating to the exhaustion of remedies within the order.

3. SAME—WAIVER.

   It did not amount to a waiver of the condition precedent, that the clerk of a local camp told the plaintiff if she would pay a part of the amount received to her daughter-in-law, the claim would be allowed, when it appeared that she rejected the proposition and lost nothing in reliance on it.

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4. SAME — DELAY IN DETERMINATION — REASONABLE TIME — BY-LAWS.

The board of directors may not arbitrarily and indefinitely postpone action on a claim, and thereby defeat the beneficiary's right of action, although the by-laws fix no time within which they shall act.

5. SAME—REASONABLE TIME.

Nine months is not an unreasonable time for the board of directors to take in passing on a claim which they had caused to be investigated and found reason to believe was invalid for breach of a condition in the insurance policy against the excessive use of intoxicating liquors.

Error to Washtenaw; Kinne, J. Submitted June 29, 1910. (Docket No. 111.) Decided September 28, 1910. Rehearing denied February 1, 1911.

Assumpsit by Margaret Larkin against the Modern Woodmen of America on a policy of insurance. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed, and no new trial ordered.

Truman Plantz and *Smith, Baldwin & Alexander*, for appellant.

A. J. Sawyer & Son, for appellee.

BROOKE, J. Plaintiff is the beneficiary in an insurance policy issued to her son by the defendant, a fraternal organization. The insured came to his death by falling from the rear platform of an interurban car, on September 19, 1908. He had been a member of the defendant society for about nine years. The issues raised by defendant's plea were:

(1) That the suit was prematurely launched.
(2) That the insured had misrepresented material facts in his application, with reference to his use of alcoholic beverages.
(3) That the policy of insurance had been rendered void by the act of the insured in becoming intemperate in the use of intoxicating liquors.

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(4) That the insured came to his death, either directly or indirectly, because of the intemperate use of intoxicating liquors.

Testimony was introduced on behalf of the defendant tending to establish each of these claims. With reference to the first: It appears that the insured died on September 19, 1908, and that proofs of death were duly forwarded to defendant. They were referred to Mr. C. J. Byrns of Ishpeming, Mich., for investigation, in October, 1908. Mr. Byrns made an investigation as to the habits of the insured, which resulted in disclosing facts which defendant relies upon to defeat the policy, upon the merits of the case. On February 27, 1909, Byrns wrote to plaintiff's counsel as follows:

"Am advised suit has been brought by the widow of our deceased neighbor (the insured) against the saloon keeper who sold him liquor the day of his death, which accounts for the delay in payment beyond the March meeting of the board."

On June 23, 1909, Byrns wrote as follows:

"I thank you very much for the information conveyed, relative to the nonsuit (the widow's suit against the saloon keeper). The next meeting of our board of directors will convene at Rock Island, Ill., on the 14th of July, when a concluding decision will be reached in connection with this claim."

Six days later, on June 29, 1909, plaintiff commenced her suit.

The certificate sued upon contained the following provision:

"(6) No action can or shall be maintained on this certificate until after the proofs of death and claimant's right to benefits, as provided for in the by-laws of this society, have been filed with the head clerk and passed upon by the board of directors, nor unless brought within one year after the date of such action by said board."

Section 45 of the by-laws contained the same provision. We have recently held that a clause similar in all essen-

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tials to the above is binding upon the parties, and that no action can be instituted until the remedies within the order are exhausted. *Conley* v. *Supreme Court, I. O. F.*, 158 Mich. 190 (122 N. W. 567), and cases there cited. It was claimed by plaintiff that this provision of the by-laws had been waived by the defendant. A motion having been made by the defendant for a directed verdict, upon the ground that the suit was prematurely brought, the court said:

"My idea about the matter is that the only question for the jury to determine is whether or not he had become intemperate in the use of intoxicating drinks. If they find he had, I don't think she can recover. I don't think there is any evidence of a waiver. At present I will deny the motion, and you may go to the jury."

Upon this point the court charged the jury as follows:

"It is claimed by the defendant in this suit that the plaintiff could not maintain this suit until her remedy provided by the by-laws had been exhausted; that is, until it had been passed upon by the board of directors. If the jury shall find from the evidence in this case that a time was fixed for the hearing of plaintiff's claim before the board of directors and no action was taken, and that a second time was fixed for the hearing of said claim and no action was taken, and that in the interim the beneficiary, the plaintiff in this case, was informed by the defendant's agents that if she would pay a part of the loss to the daughter-in-law the claim would be allowed, and it was intimated to her that the claim would be allowed, then the jury have a right to find that the defendant had waived the right to defeat the plaintiff's recovery on the ground that suit had been prematurely brought."

The defendant's agent, referred to in the quotation, one Taylor, was clerk of the local camp at Adrian. Section 40 of the by-laws provides:

"No officer of this society except as provided in section 107 hereof, nor any local camp officer, is authorized or permitted to waive any of the provisions of the by-laws of this society which relate to the contract between the mem-

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ber and the society, whether the same be now in force, or hereafter enacted."

Section 271 provides:

"The clerk of the local camp is hereby made and declared to be the agent of such camp and not the agent of the head camp, and no act or omission on his part shall have the effect of creating a liability on the part of this society, nor of waiving any right or immunity belonging to it."

It is clear that Taylor, the clerk of a local camp, could not waive the by-laws of the society. *Lord* v. *National Protective Society*, 134 Mich. 357 (96 N. W. 443). See, also, *Showalter* v. *Modern Woodmen of America*, 156 Mich. 390 (120 N. W. 994), where this court said:

"But the contract was with the great camp, and the waiver must be by the great camp, and a waiver which would bind the great camp must arise from a failure to do some act which it was its duty to do to avoid the waiver."

The following cases bear upon the same question: *Cook* v. *Insurance Co.*, 84 Mich. 12 (47 N. W. 568); *Kocher* v. *Catholic Benevolent Legion*, 65 N. J. Law, 649 (48 Atl. 544, 52 L. R. A. 861, 86 Am. St. Rep. 687); *Field* v. *Knights & Ladies of Security*, 64 Neb. 226 (89 N. W. 773); *Royal Highlanders* v. *Scovill*, 66 Neb. 213 (92 N. W. 206, 4 L. R. A. [N. S.] 421); *Modern Woodmen of America* v. *Talbot*, 76 Neb. 621 (107 N. W. 790). But, even if Taylor had had authority to bind defendant, what he said, according to the testimony of plaintiff, would not constitute a waiver of the by-laws. His statement that, if plaintiff would pay a part of the loss to her daughter-in-law, the claim would be allowed, was not acted upon by plaintiff, nor was any expense incurred by her in reliance thereon. Indeed, she rejected the proposition at the time it was made.

It will be noted that the by-law in question fixes no time limit within which the board of directors must pass upon the claim. We think it clear that the board may not arbitrarily and indefinitely postpone action upon a claim

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and so defeat a beneficiary's right of action. It is its duty to act in good faith and within a reasonable time. Was the delay in the case at bar an unreasonable one under the circumstances? We think not.

The investigating member of the board received much information in the home town of the insured tending to establish:

(1) The fact that he had become intemperate in the use of alcoholic liquors; and
(2) That he had come to his death, either directly or indirectly, through such use.

It must be remembered that in the payment of death claims this society is administering a fund in the nature of a trust, and that it is not only its privilege, but its bounden duty, to make all reasonable investigation to the end that the funds of the society may not be paid out to those not legally entitled to the same, thereby weakening the protection to those members of the society who are in good faith keeping to the terms of the contract between them and it. The correspondence clearly indicates that the board was proceeding with reasonable celerity and in good faith to determine whether or not payment should be made upon the certificate, without contest, and, as indicated by the letter of June 23d, that decision would have been reached within a few days thereafter.

A verdict should have been directed for the defendant upon this ground, but without prejudice to the commencement of another action, in case the decision of the board should be adverse to the claimant.

Reversed, and no new trial ordered.

OSTRANDER, MOORE, BLAIR, and STONE, JJ., concurred.

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MURRAY *v.* INNER SHOE TIRE CO.

JUDGMENT—ACTION PENDING—APPEAL AND ERROR—RES JUDICATA.

A judgment is not *res judicata* in a subsequent action involving the same matter where, at the time of the second trial, no judgment has been entered on the prior verdict, and the time for appeal has not elapsed.

Error to Kent; Perkins, J. Submitted June 17, 1910. (Docket No. 79.) Decided July 14, 1910. Rehearing denied December 30, 1910.

Assumpsit by A. Linn Murray against the Inner Shoe Tire Company on a promissory note. A judgment for plaintiff on a verdict directed by the court for an insufficient amount is reviewed by him on writ of error. Reversed.

Maher & Barnard, for appellant.

Richard C. Goodspeed, for appellee.

MOORE, J. This action was commenced in justice's court June 8, 1909, to recover the amount due upon a promissory note for $400, given by the defendant to the plaintiff, Murray, December 5, 1908, payable upon demand with interest at 6 per cent. Under the instructions of the court, the jury rendered a verdict in favor of Mr. Murray for a sum less by $217.35 than the amount due upon the note. The case is brought here by writ of error.

The defendant is a manufacturing corporation of which Mr. Murray was a stockholder and a traveling salesman. On November 1, 1908, there was found to be due him $1,509.31. A settlement of this amount was made December 5, 1908, by giving him the note in suit for $400, and four other notes for $250, $250, $300, and $309.31, respec-

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tively. He continued to work for the defendant and it made advances to him and opened a new account with him, which included not only what was charged against him for advances made and credits for commissions earned under his contract, but other items of debit and credit. After this suit was commenced in justice's court, the defendant filed a bill of particulars of set-off to the note.

Mr. Murray also brought suit upon each of the other notes in justice's court. While these were pending, defendant commenced a chancery suit against Mr. Murray to enjoin his proceeding with the justice's court cases, which chancery suit was later dismissed. Mr. Murray recovered a judgment in justice's court upon the note sued upon, and an appeal was taken to the circuit court. In the meantime he brought suit upon the open account in the superior court. A defense of set-off was interposed therein. That case was heard before the one now before us was tried in the circuit court. A jury returned a verdict therein as follows:

"The jury say upon their oath that the defendant did undertake and promise in manner and form as the plaintiff hath in his declaration in this case complained against him; and that they find and fix the plaintiff's claim in this case at the sum of $1,443.70, and further that they find that the defendant has made payment to the plaintiff in the sum of $1,654.72, and that the defendant has overpaid the plaintiff in the sum of $211.02, and that they find the plaintiff has no cause of action; therefore, on motion of Richard C. Goodspeed, attorney for said defendant, Inner Shoe Tire Company, it is ordered and adjudged by the court now here that the plaintiff's claim in this case be fixed and established at the sum of $1,443.70, and that that has been paid, and further that the plaintiff has been overpaid in the sum of $211.02, and further that as to matters set forth in the plaintiff's declarations herein, the plaintiff take nothing, and that the defendant go therefore without day, and the said defendant, Inner Shoe Tire Company, do recover against said A. Linn Murray, its costs and charges herein to be taxed, etc."

Upon the trial of the case now before us in the circuit

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court, the defendant withdrew its plea of set-off, and the trial judge, upon its motion, directed the jury to deduct from the amount due upon the note the $211.02 referred to in the verdict of the jury, upon the theory that there had been an adjudication which bound the parties, and which should be treated as a payment on the note. It is from this action the appeal to this court is taken, and many reasons are assigned why this action is error.

It is not necessary to go into these in detail. At the time this case was tried in the circuit court no judgment had been entered upon the verdict of the jury, and the plaintiff still had a right to appeal the case to this court. It was stated upon the argument that an appeal had been taken. Under the facts disclosed by the record, what was done by the jury in the superior court was not such an adjudication as to justify the trial court in applying the amount as a payment made upon the note sued upon in this case. As the record then stood, the trial judge should have directed a verdict in favor of the plaintiff for the amount of the note and interest thereon.

Judgment is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

BOOS *v.* SCUDDER.

1. CONSTITUTIONAL LAW—INTOXICATING LIQUORS—STATUTES.
   Whether Act No. 291, Pub. Acts 1909, gives too wide a latitude to the sales which a wholesaler may make, is a legislative, not a judicial, question.

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2. INTOXICATING LIQUORS—ORDINANCE OF VILLAGE—PROHIBITION.
A village ordinance enacted under 1 Comp. Laws, § 2769, and prohibiting any person from conducting a saloon or bar for the sale of intoxicants, does not preclude the wholesaling of liquors, except such as may be sold in a saloon or at a bar.

3. SAME—WORDS AND PHRASES—SALOON.
The word saloon, as used in the statute, refers to places where persons come to buy liquor to be drunk on the premises.

4. SAME—WHOLESALE AND RETAIL—LICENSE.
Prohibition of saloons and saloon bars in a village, by ordinance, is no justification for refusing to grant a license to a wholesale liquor dealer.

5. SAME—MANDAMUS.
Mandamus will not issue to compel a village council to grant a liquor dealer's license, where it was found by the lower court that the council adjourned at once after the application and bond were filed under a pending motion to adjourn, and had not sufficient time after filing to consider the matter.

6. SAME.
Nor will the writ compel the granting of a license which, on the face of the application, will authorize the sale of spirituous or intoxicating liquors in the barroom of a hotel, in such village.

7. SAME—MUNICIPAL CORPORATIONS—VILLAGES—WARNER-CRAMTON ACT.
The Warner-Cramton Act (Act No. 291, Pub. Acts 1909) did not repeal the general village law, or prevent villages from suppressing saloons under the prior statute.

8. STATUTORY CONSTRUCTION—REPEALS BY IMPLICATION.
Repeals by implication not being favored, acts which are not irreconcilable should be allowed to stand.

ON REHEARING.

MANDAMUS—INTOXICATING LIQUORS—LICENSE.
It appearing to the court, on rehearing, that the question of relator's right to a wholesaler's license was litigated in the court below, and that under the opinion of this court he was entitled to such license, mandamus was granted to compel the council to grant it.

Certiorari to Kalamazoo; Knappen, J. Submitted July 15, 1910. (Calendar No. 24,117.) Decided Septem-

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ber 27, 1910. Rehearing granted December 22, 1910. Former opinion modified January 9, 1911.

Mandamus by Frank H. Boos to compel Charles B. Scudder, president, and others, constituting the common council of the village of Augusta, to approve a liquor bond. An order denying the writ is reviewed by relator on writ of certiorari. Reversed.

Harry C. Howard, for relator.

Frost & Farrell and *Stewart & Jacobs*, for respondents.

HOOKER, J. On June 10, 1910, the relator made and filed an application to the council of the village of Augusta, in Kalamazoo county, for a license to carry on the business of selling at wholesale brewed or malt liquors. He accompanied it with a surety company's bond in the proper amount. The council adjourned to June 16th, on which day a motion not to consider the wholesale bond was carried, whereupon while the council was in session, but after a motion to adjourn had been made, an application for a retail license and a retail dealer's bond were presented. Adjournment was then voted by the council without action. Relator thereupon petitioned the circuit court for a mandamus to compel the council to accept the bonds and issue the licenses, and, upon the return to the order to show cause, the prayer of the petition was denied, and relator has brought the case to this court by certiorari.

Augusta is organized under the general law for the incorporation of villages, being chapter 87, 1 Comp. Laws. Subchapter 7 of said chapter 87 contains the provision conferring powers upon the council, among which is "to suppress saloons for the sale of spirituous and intoxicating liquors," etc. 1 Comp. Laws, § 2769, subd. 7. On March 14, 1910, the council adopted the following ordinance:

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"Ordinance No. 35.

"To suppress saloons and bars for the sale of spirituous and intoxicating liquors.

"SECTION 1. The village of Augusta ordains, that it shall be unlawful for any person or persons to own, establish or operate, in person, or by clerk, servant, agent or employé, any saloon or saloon bar for the sale of malt, brewed, spirituous, fermented, vinous and intoxicating liquors in the village of Augusta.

"SEC. 2. It shall be unlawful for any person by himself, his clerk, servant, agent or employé, to sell, offer for sale, or keep for sale, in any saloon or bar in the village of Augusta, any malt, brewed, spirituous, fermented, vinous or intoxicating liquors."

A penalty was provided by other sections which we think it unnecessary to include in this opinion.

The council bases its refusal to issue the licenses and approve the bonds upon this ordinance. In answer, the relator cites Act No. 291, Pub. Acts 1909, known as the "Warner-Cramton Law," which was an act to amend certain sections of the general law providing for the taxation and regulation of manufacturing, selling, etc., of spirituous and intoxicating liquors, and to add 35 new sections thereto, and which his counsel contends repealed subdivision 7, 1 Comp. Laws, § 2769, of the general village law. He claims, also, that the selling of liquor at wholesale not to be drunk upon the premises where sold is not keeping a saloon, and therefore the council had no power to prohibit the selling at wholesale, and, furthermore, that the ordinance does not by its terms include wholesale houses. The act of 1909 (section 2) defines a "wholesaler" as follows:

"Wholesale dealers shall be held and deemed to mean and include all persons who sell or offer for sale such liquors and beverages at wholesale in original trade packages and in bulk and by measure not to be drunk on the premises."

We do not overlook respondents' claim that this gives a wide latitude to the sales that a wholesaler may make, but,

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if it is too wide, it is a legislative, and not a judicial, question; and we observe that in section 1 of Act No. 291 that matter has received attention.

Assuming that the ordinance is valid, we are constrained to say that it does not in terms preclude the wholesaling of liquor, except where it shall be sold in a saloon or at a bar. The only construction to which subdivision 7, § 2769, is susceptible, is that the word "saloon" refers to places where persons come to buy drinks of liquor, to be drunk there. It is the common understanding of a liquor saloon that is meant, and the ordinance means no more. We are therefore of the opinion that the ordinance is no obstacle to the authority of the council to license wholesaling, and no justification for a refusal to do so, in a proper case. As we said in *Village of Sparta* v. *Boorom*, 129 Mich. 558 (89 N. W. 436):

"We are not prepared to say that a wagon might not constitute a saloon, or that a saloon might not be movable, or that it would be any the less a saloon because it was continually moved from place to place, but that is not the charge here. The general village incorporation act did not authorize the prohibition of the sale of liquor in general terms, and it omitted to enlarge the meaning of the word 'saloon.' The term has a common and well-understood meaning, and this meaning must be applied to this act. 1 How. Stat. § 2; 1 Comp. Laws, § 50. It did not authorize the village council to enlarge its meaning by calling every man who should make a sale of liquor a saloon keeper, and the cases which hold that a single sale may be evidence to show a man a saloon keeper, where it occurred in a saloon, are not in point."

To this we may add that it does not follow that a wholesaler may not so conduct his business as to make him chargeable with keeping a saloon, or doing it in a saloon or over a bar. See *Rattenbury* v. *Village of Northville*, 122 Mich. 160 (80 N. W. 1012). We think that the case of *Craig* v. *Werthmuller*, 78 Iowa, 598 (43 N. W. 606), is plainly distinguishable from this case, and that the allusions to saloons and saloon purposes have no application here, and it seems to us so obvious that we do not feel

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justified in elaborating the question of its application. Counsel for respondents offer two other reasons why this writ should not issue:

(1) That the council in good faith refused to pass upon the sufficiency of the wholesaler's bond, and has not considered the question, apparently relying on the ordinance as a sufficient reason.

(2) That the application and bond were filed with the council pending a motion to adjourn and that the council almost immediately adjourned.

The court found this to be true, and that the council had not had "sufficient time after such filing to consider the same to justify the court in ordering their approval."

We must accept this finding of facts as true, and therefore the writ cannot issue. But as this is a reason that is technical in its nature, we consider the other reason, viz., that their refusal is justified by the ordinance, to settle a question which is really involved, and to prevent the necessity of further litigation by another application for mandamus as to the retailer's license. This application on its face asks a license to sell spirituous or intoxicating liquors in the barroom of a hotel. It therefore was an application to sell over a bar, if not in a saloon, and we think it within the prohibition of the ordinance, and therefore, unless the ordinance is void, the writ cannot issue.

It is relator's claim that the general village law was repealed by the Warner-Cramton act of 1909. Act No. 291, Pub. Acts 1909. The law for the incorporation of villages (chapter 87, 1 Comp. Laws) was passed in 1895 (Act No. 3, Pub. Acts 1895). As we have seen, it conferred power upon councils to prohibit saloons. Unless it has been repealed by implication, it is yet in force, and the ordinance is a sufficient answer to relator's claim, as this later act in its turn took precedence over the liquor law of 1887 (Act No. 313, Pub. Acts 1887, 2 Comp. Laws, § 5379 *et seq.*), and gave to Augusta local powers on this subject. It is claimed that this was done by the amendments of 1909.

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Starting, then, with the proposition that the exclusive provisions of the law of 1887 (which we have held repealed ordinances on this subject at the time it was passed) were limited in their application by the law of 1895, which reenacted the authority to village councils, we must inquire whether Act No. 291, Pub. Acts 1909, is consistent with the continued existence of subdivision 7 of the village incorporation act for it having been made to appear by the passage of the act of 1895 that, notwithstanding the interpretation previously put upon this identical subdivision 7 in the former village incorporation law, it was the legislative will that the power should be reconferred upon the village councils, we must find some subsequent legislation showing a contrary intent, or conclude that there was no intention to repeal it. The act of 1909 amended and added to the general liquor law of 1887. Some of the reasons given in *People* v. *Furman*, 85 Mich. 110 (48 N. W. 169), have lost their force by the passage of the law of 1895; *e. g.*, that this was a general liquor law, and that it especially provided that all inconsistent laws should be repealed. There is nothing in the law of 1909 to show that it or the law as amended was designed to be of more general application than that of 1887, after the limitation was put upon it by the new village act, and there is an absence of any new repealing act. We find nothing in the law of 1909 justifying the inference that it was designed to take from incorporated villages the power reconferred by subdivision 7 of the act of 1895. Upon this subject, where one act is special, see a discussion in *People* v. *Wenzel*, 105 Mich. 70 (62 N. W. 1038). Neither of these acts is special, but there may be seen an analogy arising from the fact that the general incorporation act confers special powers to a class of localities. There is nothing irreconcilable in these two acts, and, as said by Endlich on Interpretation of Statutes, § 210:

"But repeal by implication is not favored. (*a*) It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute

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book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is a rule founded in reason, as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law so positive as to be irreconcilable by any fair, strict, or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject."

See, also, *Lake* v. *Village of Cedar Springs*, 162 Mich. 569 (127 N. W. 690).

We are of the opinion therefore that the order of the learned circuit judge was correct, and the same is affirmed.

BIRD, C. J., and OSTRANDER, MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

ON REHEARING.

PER CURIAM. Counsel filed a motion asking a further order in this cause; *i. e.*, that a mandamus issue requiring the village board to convene and approve the application for a wholesaler's license, and that relator have two weeks thereafter within which to file a satisfactory bond, procure its approval, and file the same. A rehearing was had.

The relief asked by the prayer of the petition in the circuit court was that a mandamus issue to compel the village council to approve the "application and bonds" and the clerk to certify to such approval. Apparently the cause was there litigated upon the question of the validity of the ordinance, and the authority and good faith of the council in refusing to accept surety bonds. Under his finding

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of facts and law, he held that the council had authority to refuse surety bonds, and denied the writ on two grounds: (1) That the ordinance was valid, and precluded a retailer's license on this application; and (2) that the council had not consented to accept a surety bond on either application. We saw no evidence that he was asked to compel action granting the prayer of the petition alone, or that he considered such question. The cause was brought here by certiorari, and the question is whether the trial court erred in his application of the law to the facts.

Were the case one of original jurisdiction in this court, we might have granted the relief now sought. See *Hosier* v. *Township Board*, 45 Mich. 340 (7 N. W. 897). Where, however, the case originates in the circuit court, the general rule in certiorari cases prevails, and we will review only questions raised below. *Patterson* v. *Goodrich*, 31 Mich. 225; *Witherspoon* v. *Clegg*, 42 Mich. 485 (4 N. W. 209). Doubtless the circuit court might have granted the writ, although not specifically asked to compel action on the petition separately; but if his attention was not apparently challenged to this, or any desire for such action expressed, we would assume that he did not consider it, but disposed of the matter upon the bond, as his opinion shows:

"The court has some doubt as to the right and power of the village to accept the bond of the relator to engage in the wholesale liquor business under the authorities cited, but does not rest its determination upon that point alone, but rather upon the fact that the village council has not consented to accept a surety company's bond in preference to a personal bond, and that they are the sole arbiters of that decisive question."

While we declined to reverse his order, our opinion shows that we intimated that a wholesale liquor license might issue. Had the council afterward been asked to grant a license separately upon the same, or, if necessary, upon a new application, it is reasonable to suppose that it might have received favorable and speedy action. An ex-

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amination of the record shows, however, that one of the issues of the respondents raised this question, and a certificate of the circuit judge recently filed shows that it was a controverted question, though not specifically disposed of by him. We are of the opinion that the relator was entitled to such relief, and therefore modify the former opinion in this respect.

The writ will issue as prayed as to the granting of the application for a wholesale license, subject to the provisions of law in relation to the required bond.

UNION TRUST CO. *v.* ELECTRIC PARK AMUSEMENT CO.

1. CORPORATIONS — PLEDGE — MORTGAGES — POWER TO SECURE LOANS.

   Under provisions in a corporate charter authorizing the company "to issue bonds and secure the same by mortgage, pledge, deed of trust or otherwise," the corporation had authority to issue bonds and pledge them to secure a debt evidenced by a corporate note.

2. SAME—PLEDGE—BONDS—CORPORATE POWERS.

   Mortgage bonds of the par value of $38,000 were a proper subject of pledge by the managing directors of the corporation, to secure a debt of $30,400, notwithstanding a resolution of the stockholders limiting the price at which the bonds could be sold to ninety per cent. of the par value.

3. SAME—PLEDGE—NEGOTIABLE INSTRUMENTS — BOARD OF DIRECTORS—VALIDITY OF MEETINGS—ESTOPPEL.

   A pledge of such bonds was valid under a resolution of the board of directors purporting to be adopted at a duly called meeting at which two of the directors attended, without any notice to the third director who held only a nominal amount of stock, lived in a different State, and never attended the corporate meetings, where the two directors conducted all the

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corporate business, obtained funds by means of the loan, and where the corporation acquiesced in their act for two years without objection.

4. PLEDGE—ASSIGNMENTS—RIGHTS OF PLEDGEE—MORTGAGE.
And where the corporation assigned its interest in the pledged bonds to another creditor as security for its debt, and such creditor purchased the bonds of the pledgee on default at public sale, it became the owner of both liens, entitled to collect interest on the bonds from the time the interest had been paid on the debt secured thereby, not being limited to interest from the date of purchase.

5. ATTORNEY AND CLIENT—FEES ON FORECLOSURE PROCEEDINGS—REASONABLENESS.
The trial court having excluded testimony as to the particulars of services rendered by complainants' solicitors on foreclosure proceedings, and having fixed the amount at $2,500 on the basis of general testimony as to value, the record is remanded, and such court is required to take further proofs as to the details thereof and the capacity in which the solicitors acted in various proceedings, for which they claim compensation.

Appeal from Wayne; Murfin, J. Submitted June 8, 1910. (Docket No. 27.) Decided July 14, 1910. Rehearing denied December 8, 1910.

Bill by the Union Trust Company, as trustee, against the Electric Park Amusement Company, the Electric City Amusement Company, and the Detroit Trust Company, trustee, for the foreclosure of a trust mortgage. The Detroit Lumber Company was made defendant by the cross-bill of the defendants. From a decree for complainants, defendants and said Detroit Lumber Company appeal. Modified and remanded for further proofs.

Russel, Campbell, Bulkley & Ledyard (*Harry C. Bulkley*, of counsel), for complainant.

George W. Radford, for defendant Electric Park Amusement Company.

Emanuel T. Berger, for cross-defendant, Detroit Lumber Company.

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BLAIR, J. The bill of complaint in this case was filed to foreclose a mortgage executed by the Electric Park Amusement Company, a corporation organized under the laws of the State of Delaware, but having its principal place of business at the city of Detroit, and delivered to complainant as trustee to secure a bond issue of $80,000, October 26, 1905.

The defendants to the original bill were the Electric Park Amusement Company, the Electric City Amusement Company and the Union Trust Company as trustee under the second mortgage (subsequently the Detroit Trust Company, trustee, was substituted in place of the latter). There are two cross-bills, the first filed by the two defendant amusement companies, to which the Union Trust Company, trustee, complainant, the Union Trust Company, trustee, a bondholder, the Union Trust Company, a corporation, and the Detroit Lumber Company, are defendants; the second by the Detroit Trust Company, succeeding trustee under a second mortgage, against the last above named defendants, and the two amusement companies.

The first mortgage, given by the Electric Park Amusement Company to the Union Trust Company as trustee, sought to be foreclosed in this case, was authorized by resolution of the stockholders passed at a meeting thereof on October 25, 1905, reading as follows:

"Whereas, for the purpose of acquiring title to the land now occupied by Electric Park Amusement Company at the corner of Jefferson avenue and Belle Isle bridge approach, Detroit, Michigan, and to make additional improvements in the way of construction of a pier on the river front, it is necessary and desirable that the company borrow the sum of eighty thousand dollars ($80,000), therefore,

"Resolved, That for the purpose aforesaid, this company issue its first mortgage bonds in the amount of eighty thousand dollars ($80,000), divided into one hundred and fifty bonds of the denomination of $250, $500 and

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$1,000 each, all to be dated October 26, 1905, and to be payable within twenty years, such bonds to bear interest at the rate of not to exceed five per cent. per annum, payable semi-annually, both principal and interest being payable in gold coin of the United States of America, of the present standard of weight and fineness, if so demanded by the holder; that such bonds be secured by a first mortgage or deed of trust of all the property, rights and franchises now owned by the company or hereafter to be acquired by it during the lifetime of said mortgage or deed of trust, and the income thereof; the bonds and mortgage in other respects than those above indicated, and the provisions for the payment of the same, to be referred to the board of directors of the corporation for determination.

"And further resolved, That said board of directors of this corporation are hereby authorized and directed to have said bonds and mortgage or trust deed properly executed by the officers of said corporation, and to negotiate the sale of said bonds and sell the same at a price not less than 90 per cent. of the par value thereof."

At the time of the adoption of this resolution by the stockholders, the directors of the corporation were Arthur H. Gaukler of Detroit, president, and who controlled a majority of the stock; Francis P. Dreher of Detroit, secretary, and Harry W. Davis of Wilmington, Delaware, who held ten of the $1 shares of stock.

On the same day that the foregoing resolution was adopted by the stockholders, Gaukler and Dreher held a directors' meeting, at which they adopted and certified a resolution, as follows:

"Whereas, it is desirable to provide sufficient time for the proper negotiation and sale of the eighty thousand dollars of bonds above authorized, and the company requires forty thousand dollars for present uses:

"Therefore, resolved, That the president and secretary be and they are hereby authorized to borrow the sum of forty thousand dollars from the Union Trust Company of Detroit, for the term of one year, with the privilege of renewal for an additional year, with interest at five per cent. per annum, payable semi-annually, and to execute the company's note for said loan and secure the same by

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pledge as collateral security of the entire issue of eighty thousand dollars of bonds above authorized.

"ARTHUR H. GAUKLER,
"President.
"FRANCIS P. DREHER,
"Secretary.

"The undersigned, president and secretary, respectively, of the Electric Park Amusement Company, hereby certify that the foregoing is a true and correct copy of a resolution passed by the board of directors of said Electric Park Amusement Company at a meeting duly called and held on October 25, 1905, at which meeting the following directors, Arthur H. Gaukler and Francis P. Dreher, being a quorum of the said board, were present.

"ARTHUR H. GAUKLER,
"President.
"FRANCIS P. DREHER,
"Secretary."

On the basis of this resolution the Union Trust Company loaned $40,000 to the Electric Park Amusement Company, which it used for legitimate purposes. Forty-two thousand dollars of the bonds were sold and released from pledge and a sufficient amount of the proceeds applied upon the $40,000 loan to reduce it to $12,666.68.

April 28, 1906, the Union Trust Company loaned to the Electric Park Amusement Company $30,400 and took the following contract note:

"$30,400.00. DETROIT, MICH, April 28, 1906.

"Four months after date, Electric Park Amusement Company promises to pay to the order of the Union Trust Company, of Detroit, at its office in the city of Detroit, Michigan, thirty thousand four hundred and 00-100 dollars, for value received, with interest at the rate of six (6) per cent. per annum, having deposited herewith, as collateral security for the payment hereof, and all other liabilities, absolute or contingent, present or future, of the undersigned to the said Union Trust Company, thirty-eight thousand dollars ($38,000.00) par value, of bonds of said Electric Park Amusement Company of the issue of October 26, 1905; which property, or any part thereof, with any other property hereafter deposited in substitution therefor or in addition thereto, the holder of this note, in

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default of payment thereof, is authorized to sell, at the expense of the undersigned, at public or private sale, at its option, and at its option to purchase at such sale, and to apply the proceeds in payment of this note, and the balance upon such other of said liabilities as the holder may elect.

"It is further agreed that if default be made in the payment of any installment of interest when the same shall become due, or if in the opinion of the holder of this note, the said security shall depreciate in value, said holder may elect without notice that this obligation is due and payable on demand.

"It is further agreed that said Union Trust Company shall have the right to hold and apply, at any time, its own indebtedness or liability to the maker hereof, or any securities or property of the maker in its custody or possession, as security for the payment of any liability due, or to become due, from the maker hereof.

"ELECTRIC PARK AMUSEMENT CO.,
"By ARTHUR H. GAUKLER, President.
"By FRANCIS P. DREHER, Sec. & Treas."

The foregoing loan was based upon the following certified action of the directors:

"The undersigned, respectively, president and secretary of the above named corporation, do hereby certify that the following is a true and exact copy from the books of the corporation of a resolution which was regularly adopted at a special meeting of the board of directors of said corporation, duly called and held on the 25th day of April, A. D. 1906, a quorum being present at said meeting, to wit:

"On motion of Francis P. Dreher, secretary, seconded by Arthur H. Gaukler, president, it was resolved that the president and secretary be authorized and directed to execute and deliver to the Union Trust Company, of Detroit, Michigan, the note of the Electric Park Amusement Company of Delaware, for the sum of $30,400, payable four months after date, with interest at the rate of six per cent. per annum, and to execute and deliver to the said Union Trust Company, as security for the payment of said note, a collateral assignment of $38,000 of bonds now held in the hands of the said Union Trust Company as collateral to a note of $12,666.68, with the usual conditions for the sale of said bonds in case of any default in meeting the conditions of said note, and to deliver together with

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said note and said collateral assignment the said bonds; that from the proceeds of said loan the president and secretary pay to the Union Trust Company all the indebtedness now existing from this company to the Union Trust Company; and that $15,000 of par value of stock of the Electric Park Amusement Company be delivered to F. M. Delano for services in securing loan.

"(Corporate Seal).

"ARTHUR H. GAUKLER,
"President.
"FRANCIS P. DREHER,
"Secretary."

On said April 28, 1906, The Electric Park Amusement Company and the Detroit Lumber Company entered into the following agreement:

"An agreement entered into between the Electric Park Amusement Company, a corporation organized under the laws of the State of Delaware, of Detroit, Michigan, party of the first part, and the Detroit Lumber Company, a corporation organized under the laws of the State of Michigan, of Detroit, Michigan, party of the second part, at Detroit, Michigan, on the 28th day of April, 1906, witnesseth:

"Whereas, that heretofore, to wit, on the 5th day of March, 1906, the parties hereto did enter into a contract—a copy of which contract is hereto attached, marked Exhibit A; and

"Whereas, said party of the second part has this day released in full its lien and claim to the ten thousand dollars ($10,000) of bonds of said party of the first part created by said agreement; and

"Whereas, in consideration of such release, said party of the first part is willing to assign to said party of the second part as collateral security to the payment of its debt, as more specifically stated and provided for in said Exhibit A, to which reference is hereby made and which is made a part hereof, except as herein provided, to said party of the second part all of its interest in and to said thirty-eight thousand dollars ($38,000.00) of its bonds, subject to the rights and lien of the Union Trust Company, of Detroit, Michigan, to said bonds, said bonds being now pledged to the Union Trust Company to secure the payment of the principal and interest of its loan to said party

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of the first part, which loan is for the sum of thirty thousand four hundred dollars ($30,400):

"Now, therefore, in consideration of the premises, the said party of the first part does hereby assign unto said party of the second part its interest in said thirty-eight thousand dollars ($38,000) of its bonds as collateral security to the payment of the debt of said party of the first part to said party of the second part.

"It being expressly provided, however, by the parties hereto that this assignment is made subject to the lien of said Union Trust Company to any and all of said bonds. It being further understood that said party of the second part has no interest whatever in the same until after the payment in full of both principal and interest by said party of the first part to said Union Trust Company of its said loan of thirty thousand four hundred dollars ($30,400).

"In witness whereof, the said Electric Park Amusement Company has hereunto subscribed its name by its president and secretary-treasurer, and affixed its corporate seal the day and year first above written; and the said Detroit Lumber Company has hereunto subscribed its name by its president and secretary, and affixed its corporate seal the day and year first above written.

(Corporate Seal).

"ELECTRIC PARK AMUSEMENT CO.,
"By ARTHUR H. GAUKLER, President.
"FRANCIS P. DREHER,
"Secretary-Treasurer.
"DETROIT LUMBER CO.,
"By E. L. THOMPSON, President.
"HENRY OTIS, Secretary."

(Corporate Seal).

The Electric Park Amusement Company having defaulted as to the $30,400 note, the Union Trust Company sold at public sale the $38,000 of bonds to the Detroit Lumber Company for $31,500, which canceled the indebtedness of the amusement company to the Union Trust Company, leaving a surplus of $163.18, which was paid over to the Detroit Lumber Company.

The Electric Park Amusement Company conveyed its property to the Electric City Amusement Company, which was a reorganization of the first named company. Further

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facts will be found in the case of *Schmidt* v. *Gaukler*, 156 Mich. 243 (120 N. W. 746).

Among the corporate powers of the corporation, as specified in its articles of association, are the following:

"To issue bonds, debentures, or obligations of this corporation from time to time, for any of the objects or purposes of the corporation, and to secure the same by mortgage, pledge, deed of trust, or otherwise."

The by-laws contain, among others, the following provisions:

"The property and business of the company shall be managed and controlled by a board of three directors who shall at all times be stockholders, and at least one of whom shall be an actual resident of Delaware. * * *

"Regular meetings of the directors shall be held on the fourth Monday of each month at the office of the company in Detroit, State of Michigan, at twelve o'clock noon, or by order of the directors elsewhere, on a day and at an hour to be fixed by the board. No notice of regular meetings of the board shall be necessary. A majority of the whole board of directors shall be necessary at all meetings to constitute a quorum for the transaction of business. Special meetings of the board may be called by the president on three days' notice to each director, either personally or by wire; special meetings may be called in like manner on the request in writing of two directors."

Director Davis never came to Detroit and the minutes show that he never attended any of the directors' meetings; and that he never was sent any notice of any meeting. Mr. Gaukler, president of the company, and Mr. Dreher, secretary, were in absolute and complete charge of all the business of the company and signed all agreements and conveyances in its behalf.

From the decree entered in favor of complainant defendants have appealed to this court.

Counsel for defendants concede that the bond issue was legal and that the mortgage is a lawful security as to the $42,000 worth of bonds sold, but contend as to the $38,000

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of bonds, as averred in the cross-bill of the Detroit Trust Company:

"That said attempted pledge was wholly illegal, being entirely beyond the scope and purpose of said trust mortgage and the resolution authorizing the issue of said bonds, beyond the scope and powers of said Electric Park Amusement Company as a corporation, and beyond the scope and powers of the officers and directors of said Electric Park Amusement Company, and in violation of the authority given by the stockholders to the directors of said Electric Park Amusement Company for the sale of said bonds; and that the action of the officers and directors of said company in so attempting to pledge said bonds, was taken at an illegal meeting thereof, if any, in violation of the requirements of the by-laws of said company, all of which facts were fully known, at the time, by said Union Trust Company, which dealt with the matter under such circumstances as to put said Union Trust Company upon inquiry as to the legality of said transaction, in all of its phases."

The important question is whether the pledge of the $38,000 of bonds was beyond the power of the corporation to make, under any circumstances. Counsel for defendants argue that the provision of the charter empowering the corporation "to issue bonds, etc., * * * and to secure the same by mortgage," etc., considered in connection with the general corporation laws of Delaware prohibiting the exercise of "any other corporate powers, except such incidental powers as shall be necessary to the exercise of the powers so given," amounts to a statutory prohibition against pledging the corporation's bonds. In the language of counsel:

"The mortgage in question in this case covered all of the corporation's real estate and 'also all other property and assets, real and personal, of every name and nature, which the said amusement company now owns or may hereafter acquire.' The bonds secured by said mortgage became the debts, not property, of the corporation, as soon as issued and sold as the stockholders prescribed; the bonds were never property of the corporation that could be pledged to secure other debts; they were debts only to

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secure which property of the corporation could be pledged. The quotation from the corporate powers of the company, on page 15 of complainant's brief, has no other meaning. The power 'to issue bonds * * * and to secure the same by mortgage, pledge, deed of trust, or otherwise,' does not mean power to issue bonds and secure other debts by pledge of those same bonds."

We do not so construe the charter provision. Conceding that the power "to issue bonds, debentures or obligations * * * and to secure the same by mortgage, pledge, deed of trust or otherwise," does not contemplate the issuing of bonds and the securing of the same by a pledge of the bonds so issued, it does not follow that the charter provision did not contemplate the issuing of "obligations" and the securing of them by a pledge of corporate bonds. The contract note for $30,400 is denominated in its terms "this obligation," and we think it was an obligation within the meaning of the charter provision. *Emerson* v. *Steel & Spring Co.*, 100 Mich. 127 (58 N. W. 659); *Hill* v. *Bloom*, 41 N. J. Eq. 276.

The company had express power, therefore, to secure the payment of the obligation in question by the pledge of any property which could be pledged. We have no doubt that the mortgage bonds were a proper subject of pledge and this, notwithstanding the resolution of the stockholders. Jones on Pledges (2d Ed.), §§ 70–74; 2 Thompson on Corporations, § 1192; *Union Cattle Co.* v. *Trust Co.*, 149 Mass. 492; *William Firth Co.* v. *Trust Co.*, 122 Fed. 569; 3 Cook on Corporations (6th Ed.), § 709; *New Memphis Gaslight Co. Cases*, 105 Tenn. 268; *Hatch* v. *Coddington*, 95 U. S. 48.

The remaining question on this branch of the case is whether the pledge was invalid because of the failure to notify the third member of the board of directors of the special meeting at which the resolution was adopted. It is apparent that notification of Davis would have been an idle formality, since he never attended the meetings of the corporation in Michigan, where its entire property was

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located. The corporation permitted Gaukler and Dreher to exercise all the functions and powers of the directorate, and there is no evidence that any other stockholder or director is complaining, but they alone appear to be carrying on this litigation, setting up the falsity of their own certificates to defeat a just debt. The contract was one within the lawful powers of the corporation; it received $40,000 of money on the first pledge of bonds, which it used for its lawful purposes; it paid from the proceeds of its sales of bonds a large part of this indebtedness to the Union Trust Company; six months later it received $30,400 more, which it also applied to its own proper purposes, and not until September 23, 1907, nearly two years after the making of the first pledge, did it raise any question as to the validity of the pledge. Under such circumstances the corporation must be deemed to have ratified the action of the two directors in pledging the bonds and to be estopped to question its validity. *Jones* v. *School District*, 110 Mich. 363 (68 N. W. 222); *Clement, Bane & Co.* v. *Clothing Co.*, 110 Mich. 458 (68 N. W. 224).

The decree of the circuit court found that the Detroit Lumber Company was entitled to collect on the coupons attached to the $38,000 of bonds only from September 23, 1907. The lumber company has appealed from this portion of the decree, claiming that it is entitled to collect on the interest coupons from May 10, 1907, to which time the interest had been paid on the indebtedness secured by the bonds. We are of the opinion that the position of the lumber company is well taken and that the decree should have made May 10th the starting point. *Warner* v. *Iron Co.*, 3 Woods (U. S. C. C.), 514.

By the agreement of the parties the amusement company assigned its interest in the bonds to the lumber company, subject to the lien of the Union Trust Company "as collateral security to the payment of the debt of said party of the first part to said party of the second part," and the lumber company, by its purchase of the bonds, be-

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came the owner of both liens, and is entitled to enforce both, subject to an accounting for the surplus, if any.

The remaining question for our consideration relates to the compensation of the trustee and its counsel. With reference to this subject, the circuit judge said:

"As far as the compensation to be allowed this complainant is concerned, that is the only other thing I have left to consider. That is a matter that is very difficult, at all times, for a court to pass upon, and, I confess, it is more or less of an embarrassment to pass upon it. As far as the solicitors of record are concerned, there can be no doubt that, at different times, they have acted in connection with this matter in three different capacities, and there can be no doubt, at those times, they were entirely within their rights, and doing it with entire propriety. They were interested as solicitors for the trustee under the first mortgage; they were interested as solicitors for the trustee under the second mortgage; they were interested as solicitors for the trust company itself, as a creditor. How to tell when they were acting in one capacity, and when they were acting in another, is something that I am not going to attempt to do, or reconcile, because it is perfectly obvious that, at some time, what they did was for their benefit in all three capacities, and, at other times, it was only for the benefit, possibly, in one or two capacities. For example, in the litigation to which reference has been had, in the *Schmidt Case*, they appear to have gone into that litigation in one capacity, and come out of it in an entirely different capacity, as I read the record, in the Supreme Court's opinion. From my knowledge of these counsel, and my belief in their integrity, I have no reason to question, nor has it been questioned, in this proceeding, that they were taking every step according to their best and conscientious judgment. That being true, when they swear, under oath, they think their services, as rendered—without going into particular details, which I find I am to blame for, for not hearing—were worth $2,500, I see, under the circumstances of this litigation, as they have been disclosed before me, in this hearing, no particular reason whatsoever to question that bill. That being true, I think I will allow it as presented. The same remarks apply with equal force to the charges of the trustee, and you may prepare a decree accordingly."

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As stated in the opinion and as shown by the record, the court refused to permit the defendants to go into the details of the services or to clearly separate those which were a proper charge in this suit from those which were not. Under such circumstances, we are constrained to remand the case for further proofs upon this subject. Upon hearing the further proofs, upon this subject alone, a decree may be entered by the circuit court in accordance with this opinion and the further finding of such court.

BIRD, C. J., and MCALVAY, BROOKE, and STONE, JJ., concurred.

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APPARENT AUTHORITY—See EVIDENCE (6).

APPEAL AND ERROR.

1. On a bill to enjoin the levy and enforcement of a drain tax, which, it averred, was jurisdictionally defective, a showing by the State, on appeal, that, after the entry of a decree in the court below, the board of supervisors reassessed the tax which had been paid by a third party, does not properly bring the question of payment before the Supreme Court, and requires that the cause be remanded for a hearing on the point raised. *Klotz* v. *Chatfield*, 86.

2. Where a bill of exceptions was settled irregularly because the last order extending the time was entered without cause shown, and defendant had caused a writ of error to issue, return to be made and had the record printed, he was permitted to dismiss the writ of error on terms, issue a new writ and include the original printed record as a portion of the record on the second appeal. *Kaiser* v. *Detroit United Railway*, 109.

3. Except as a matter of grace, where it is apparent that an injustice has been done, the Supreme Court will not, on appeal, reverse a conviction for an omission to charge the jury as to a point not presented by any request to charge, nor brought to the attention of the trial court by exception. *People* v. *Brott*, 150.

4. On a motion to quash, first presented after a jury has been sworn, based on the ground of want of testimony before the examining magistrate, no error was committed in refusing to discharge the respondent. *Id.*

5. A conviction upon a charge of burglary, under 3 Comp. Laws, § 11547, will not be reversed for failure to charge the jury that they must find, in order to convict the accused, that the building which he entered was not adjoining to or occupied with a dwelling house; the evidence being clear upon the point, no request to charge covering it having been offered and no dispute as to the matter having been raised on the trial. *Id.*

6. The point that a variance appears, between proofs and declaration, cannot be raised on error, without presenting it to the court below. *Hayes* v. *Wabash R. Co.*, 174.

7. An assignment of error that the court erred in refusing proponent's requests to charge, numbered first, second, fifth,

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APPEAL AND ERROR—Continued.

etc., is sufficiently specific, where the requests are numbered in the bill of exceptions. *In re McMaster's Estate*, 210.

8. Paragraphs of the court's charge, which are numbered in the bill of exceptions and included in one assignment of error, may be taken distributively. *Id.* 211.

9. In proceedings to enforce a demand against a watercraft, failure of the appellant to give notice of its intention to take additional testimony within 10 days after the filing of the return in the Supreme Court, is waived by the participation of the appellee in taking the testimony, notwithstanding appellant's neglect to comply, by giving the notice, with Supreme Court Rule 57. *Detroit Lumber Co.* v. *Auxiliary Yacht "Petrel,"* 245.

10. After additional testimony was taken on appeal, the attorney for appellant caused the depositions to be delivered to himself, and without objection of the appellee proceeded to settle a bill of exceptions for the purpose of decreasing the cost of printing, but on failing to agree upon any reduction in the size of the record, submitted the same to the printer, and proceeded with diligence to bring on the cause for hearing. *Held* that in consideration of the appellant's diligence, the unsettled nature of the practice, and the participation of appellee's attorney in the proposed settlement of a bill of exceptions, the motion to dismiss should be denied. *Id.* 246.

11. After taking depositions for use in the Supreme Court, it was the duty of the commissioner to transmit them to the court, not to deliver them to the attorney for appellant. *Id.*

12. In a suit in chancery for an accounting in which, on appeal, after a decree for defendant, the circuit judge presented a return showing that an error had been made in the record as to his findings, and on petition of the defendant to present additional facts that affect the merits of the case and that arose after the decree, the record will be remanded for amendment. *In re Choate's Estate*, 288.

13. The court will not dismiss a writ of error for failure of the clerk to make the return in time, on a motion filed after the return has been actually made. *Riley* v. *Detroit United Ry.*, 327.

14. The Supreme Court acquires no jurisdiction of a cause in which a writ of error issues more than 18 months after judgment in the court below. *Id.*

15. In an action of ejectment tried by the court without a jury, requests for findings of fact and law, and exceptions to the conclusions reached, are necessary to a review of the errors assigned, although the judge renders an oral decision and opinion on the trial relating to the questions involved. Circuit Court Rule 26. *Wilson* v. *Hugus*, 577.

16. The marriage of appellant, in proceedings for divorce, waives his right to review a decree granting to his wife a divorce on the ground of extreme cruelty; since one cannot secure a benefit under a judgment and then appeal from it, when

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APPEAL AND ERROR—Continued.

the effect of his appeal may be to annul it, unless his rights could not be affected by the reversal of the judgment. *Stebe* v. *Stebe*, 650.

17. On motion to dismiss, an appeal will be considered as waived by a defendant, claiming relief by cross-bill in proceedings for divorce instituted by her husband, where she causes the decree of the trial court awarding to her, subject to a mortgage, certain real estate, as alimony, to be recorded in the office of the register of deeds, and gives a new mortgage upon the premises for a larger amount than the original mortgage secured. *Moorman* v. *Moorman*, 652.

18. Findings of fact made by the trial court, without a jury, upon contradictory evidence, are not reviewable in the Supreme Court; it is only where there is a total want of evidence or where the finding is contrary to the undisputed evidence that the findings of fact will be reviewed. *Hindman* v. *Friedrich*, 655.

See CRIMINAL LAW (9, 11, 30, 31); DIVORCE (1); EVIDENCE (9); JUDGMENT (3); PARTIES (2); TRIAL (2).

APPOINTING POWER—See PUBLIC OFFICERS (2).

APPURTENANCES—See EASEMENTS (1–4, 12, 13).

ARGUMENT OF COUNSEL—See CRIMINAL LAW (10, 28); TRIAL (1, 2).

ARREST—See CRIMINAL LAW (31).

ARSON.

Although the information charged respondent with setting fire to three buildings, she might properly be convicted of the offense if the proofs showed that she set fire to one of them. *People* v. *Stewart*, 1.

See CRIMINAL LAW (2, 4); NEW TRIAL (1); TRIAL (1).

ASSAULT AND BATTERY.

It was error, on cross-examination of complaining witness in a prosecution for assault and battery, to exclude questions relative to what occurred in continuation of the quarrel, without interruption, a short distance from the place of the first assault. *People* v. *Yund*, 504.

See CRIMINAL LAW (6, 11, 18, 27).

ASSIGNMENTS.

1. Where a debtor delivered to his creditor an order on his employer to pay his wages to the creditor until further notice, and after the creditor had received a part of his claim, the debtor gave notice that he withdrew the order, and the creditor, learning of the attempted withdrawal of the assignment, notified the employer of the amount of his claim; evidence was admissible to show conversation constituting the alleged

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ASSIGNMENTS—Continued.

assignment, which, it was claimed, included future earnings up to the amount of plaintiff's claim, although the defendant was not present at the time, and received no information concerning it except the notice. *Weinberg* v. *Stratton*, 408.

2. While any payments made by the employer to the debtor before the notice were valid, he would be liable for amounts paid after he received notice of the extent of plaintiff's claim under the assignment. *Id.*

See PLEDGES.

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (7, 8).

ASSUMPSIT — See CORPORATIONS (8); ELECTION OF REMEDIES; TELEGRAPHS AND TELEPHONES.

Defense that plaintiff is a "trust," see CONTRACTS (3, 4).

ASSUMPTION OF RISK—See MASTER AND SERVANT (3, 10, 13, 14, 17-19).

ATTACHMENT—See PROCESS (8).

ATTORNEY AND CLIENT.

1. The law creates the lien of a solicitor upon the judgment or fund resulting from his services. *Wipfler* v. *Warren*, 189.

2. An attorney's lien is lost by reducing his demand to judgment. *Id.*

3. A solicitor may not complain of a substitution of solicitors if the order of substitution preserves his lien. *Id.*

4. A court of chancery, after rendering a decree for defendants in a stockholder's suit, and ordering the receiver, who was appointed pending a determination of the facts, to account for funds in his hands, may protect the lien of defendants' solicitor on said fund in the receiver's hands, and on motion of defendants to substitute solicitors, tendering an issue as to the amount due their solicitor, the court has power to determine the amount. *Id.*

5. The trial court having excluded testimony as to the particulars of services rendered by complainants' solicitors on foreclosure proceedings, and having fixed the amount at $2,500 on the basis of general testimony as to value, the record is remanded, and such court is required to take further proofs as to the details thereof and the capacity in which the solicitors acted in various proceedings, for which they claim compensation. *Union Trust Co.* v. *Electric Park Amusement Co.*, 688.

See MUNICIPAL CORPORATIONS (1).

AUTHORITY OF TICKET AGENT—See CARRIERS (1, 2).

AVERMENTS—See CRIMINAL LAW (20).

BANKS AND BANKING.

In an action upon a promissory note that the defendant claimed

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BANKS AND BANKING—Continued.

had been compromised by an agreement of plaintiff bank, through its cashier, to accept certain bonds in part payment, where the evidence showed that no direct authority was conferred by the board of directors upon the cashier to accept anything but cash in payment of obligations, and that the discount committee met frequently; that the officers of the bank were diligent, and no special authority could be implied from the course of dealing between the bank and its cashier, the court should have determined on the trial, as a matter of law, that the cashier had no authority to make the compromise. *Farmers' & Mechanics' Bank* v. *Clancy*, 586.

BASTARDY—See ABATEMENT AND REVIVAL (1).

BENEFICIAL ASSOCIATIONS—See INSURANCE (6, 9–16).

BENEFICIARY, CHANGE OF—See INSURANCE (10).

BEQUESTS—See WILLS (13).

BILL IN AID OF EXECUTION — See CREDITOR'S SUIT; EXECUTION.

BILL OF EXCEPTIONS—See EXCEPTIONS, BILL OF.

BILLS AND NOTES.

A promissory note of defendant, a married man, executed in connection with divorce proceedings instituted by defendant's wife, in partial settlement of property matters, under an agreement with the wife's solicitor, prepared and signed after the commencement of suit, is not void as against public policy. *Palmer* v. *Fagerlin*, 845.

See BANKS AND BANKING (1).

BOARD OF REGISTRATION OF NURSES—See PUBLIC OFFICERS (1).

BONA FIDE PURCHASER—See CHATTEL MORTGAGES (2, 3).

BONDS.

1. A bond signed on the back by principal and surety, not in the usual place for signing, and after the justification, is valid. *Cunningham* v. *Hawkins*, 817.

2. The failure of the defendants to deny, under oath, the execution of a bond counted on in the declaration, admits its legal execution. *Id.* 818.

3. Averments contained in a notice of defense, in an action on a bond, stating that the bond was given to secure the purchase price of certain goods, and that the principal sent in orders for goods for which the suit was brought, were admissions that the instrument was given to secure the price of goods thereafter to be purchased. (Circuit Court Rule 7 *e.*) *Id.*

4. A bond to pay all money due for fencing and supplies within 60 days from receipt, created an obligation of the surety to pay for goods subsequently purchased by the principal in the bond. *Id.*

See CORPORATIONS (11, 12); PROCESS (1).

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BOUNDARIES.

1. A line fence, maintained for more than forty years as a section line, cannot be held to have been built by agreement, as a boundary line, where there is no evidence that a dispute existed or a disagreement was settled when it was built. *Parsons* v. *Bills*, 415.

2. *Held* that the facts did not establish adverse possession of the land in dispute. *Id.*

3. A boundary will be considered established by a line fence which remained and was treated as the division fence between two parcels for forty years, by the adjoining proprietors, where the evidence showed that it was so treated by one private survey, and a later survey, showing a different location of the boundary, did not appear from the proofs to have been based on the finding of any original government monuments. *Id.*

BREACH OF CONTRACT — See CONTRACTS (5, 7, 8); INSURANCE (16).

BREACH OF WARRANTY—See EVIDENCE (7); SALES (3).

BURDEN OF PROOF—See COMPROMISE AND SETTLEMENT; MORTGAGES (3); WILLS (2).

BURGLARS' TOOLS—See CRIMINAL LAW (24).

BURGLARY.

1. In a prosecution for burglarizing an office, from which some caps, dynamite and fuse were stolen, testimony that the property was found concealed a couple of feet from where the respondents were arrested, two days after the crime, warranted the submission to the jury of the question whether or not respondents were in possession of it. *People* v. *McDonald*, 552.

2. While the prosecution failed to identify positively the articles found on respondents, with the stolen property, there was sufficient evidence to support the finding of the jury, where the stolen property was of the same kind and character as the respondents had, and was found on the morning of the second day following the crime. *Id.*

3. The possession of the stolen property, standing alone, is not even *prima facie* evidence that the person in whose possession it was found, committed the burglary, and although such proof unexplained is *prima facie* evidence of larceny, it will not sustain a conviction for burglary, unaccompanied by testimony of other facts and circumstances indicating the guilt of respondents. *Id.* 553.

See APPEAL AND ERROR (5); CRIMINAL LAW (24).

CARRIERS.

1. Ticket or shipping agents of common carriers have authority to make all usual and ordinary contracts of carriage and shipment, and the public may assume that they are author-

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CARRIERS—Continued.

ized to make such ordinary and usual contracts as they attempt to execute. *Hayes* v. *Wabash R. Co.*, 174.

2. A city passenger and ticket agent is authorized to contract to carry several persons promptly from his station to another city and to guarantee them to connect with the train of another company at an intermediate station. *Id.*

3. The contract of carriage may be shown by parol, and is not limited to the terms of the ticket. *Id.*

4. Under plaintiff's claim that she was thrown and injured by the premature movement of the street car from which she was alighting, the subject of negligence was properly presented to the jury by instructions that if the car started while she was in a position of danger, where the starting of the car would have a natural tendency to throw her, negligence was shown; but if she slipped while the car was at a full stop, she could not recover; that if her version was correct, she was entitled to recover; if the defendant's version was true, she was not entitled to recover. *Cummings* v. *Detroit United Ry.*, 304.

See ACTION (1); DAMAGES (3); EVIDENCE (6); TRIAL (3, 7).

CAUSE OF ACTION—See CONSTITUTIONAL LAW (10); STATUTES (1).

CAUSTIC SODA—See MASTER AND SERVANT (17).

CERTIORARI—See CRIMINAL LAW (22).

CHANCERY COURT—See EQUITY (4).

CHANCERY PRACTICE—See DIVORCE (7, 8); EQUITY (3, 9, 10).

CHANGING SEALED VERDICT—See CRIMINAL LAW (14).

CHARACTER OF WITNESS—See CRIMINAL LAW (8).

CHARGE OF COURT—See APPEAL AND ERROR (8); INSTRUCTIONS; WILLS (6).

CHATTEL MORTGAGES.

1. Under a contract conveying an interest in a business without an express reservation of title, but providing that, on failure to pay the balance of the purchase price, title should revest in the seller, the purchaser obtains the title subject to a mortgage lien of the seller; and the transaction does not constitute a conditional sale. *Coeling* v. *Green*, 27.

2. Filing such contract without an affidavit of good faith, as provided for by Act No. 332, Pub. Acts 1907, renders the transaction void as to a subsequent purchaser in good faith. *Id.*

3. In the absence of proof of actual notice of the existence of the contract, a purchaser of the business does not take it with notice. *Id.*

CHEMICALS—See MASTER AND SERVANT (17).

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CIRCUMSTANTIAL EVIDENCE — See BURGLARY; CRIMINAL LAW (2, 3).

CIVIL ACTION—See MALICIOUS PROSECUTION (1).

CIVIL-DAMAGE LAW—See INTOXICATING LIQUORS (2, 3).

CLAIMS—See ESTATES OF DECEDENTS (5).

CLERK OF COURT—See JUSTICES OF THE PEACE (4).

COLLATERAL ATTACK—See CORPORATIONS (2).

COLLUSION — See BILLS AND NOTES; DIVORCE (3); FRAUD (10).

COLOR OF TITLE—See ADVERSE POSSESSION (2).

COMMERCE—See CONSTITUTIONAL LAW (3, 4).

COMMON CARRIERS—See CARRIERS.

COMMON KNOWLEDGE—See MASTER AND SERVANT (17, 18).

COMMON LAW — See ABATEMENT AND REVIVAL (1); CONTRACTS (2, 3).

COMMON-LAW COURTS—See EQUITY (6).

COMPETENCY—See INSURANCE (10); WILLS (1, 7).

COMPETITION—See CONTRACTS (1).

COMPROMISE AND SETTLEMENT.

It was not erroneous to charge the jury that the compromise which defendant claimed was made, of plaintiff's admitted claim, must be shown by a preponderance of the evidence, and that the mere fact that defendant did work which was of value, could not be considered as canceling the indebtedness of defendant to plaintiff, unless it was done in pursuance of the alleged compromise. *Weaver* v. *Murray*, 660.

See BANKS AND BANKING (1); BILLS AND NOTES (1); ESTATES OF DECEDENTS (5); EVIDENCE (11).

CONDITIONAL SALES—See CHATTEL MORTGAGES (1).

CONDITIONS PRECEDENT—See INSURANCE (12, 14).

CONDUCT OF COUNSEL—See FRAUD (1).

CONDUCT OF COURT—See TRIAL (3, 4, 6, 9).

CONDUCT OF PROSECUTOR—See CRIMINAL LAW (28).

CONFESSIONS—See CRIMINAL LAW (26).

CONNECTING CARRIERS—See CARRIERS (2).

CONSENT—See EQUITY (7).

CONSENT TO JUDGMENT—See COSTS (2).

CONSEQUENTIAL DAMAGES—See EMINENT DOMAIN.

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CONSOLIDATION—See CORPORATIONS (8).

CONSPIRACY—See EVIDENCE (11); FRAUD (10).

CONSTITUTIONAL LAW.

1. Interstate commerce is a term of largest import; it comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between citizens of one country and the citizens or subjects of other countries, and between citizens of different States. *Imperial Curtain Co.* v. *Jacob*, 72.

2. Placing a printed advertisement, prepared in and shipped from one State, on the theater curtain in a city of another, under a contract to maintain and display the advertisement to audiences in the theater, for a period of three years, where the contract was negotiated in the city in which the advertisement was displayed and approved in the foreign State, is not interstate commerce, but business of a local character. *Id.* 73.

3. A foreign corporation is entitled to recover, without showing that it has complied with the statute regulating local business, for goods sent into the State upon orders given by mail at its business office located in the State of its residence, since they constituted interstate commerce. Act No. 206, Pub. Acts 1901; Act No. 34, Pub. Acts 1903; Act No. 310, Pub. Acts 1907. *Despres, Bridges & Noel* v. *Zierleyn*, 399.

4. The selling of jewelry by salesmen of a foreign corporation, who carry goods in trunks, and exhibit them to customers that select the goods from the stock carried, is not interstate commerce. *Id.*

5. Contracts so made are unenforceable under Act No. 34, Pub. Acts 1903, unless such corporation has complied with the regulations of the statute. *Id.*

6. Nor did the amendment of the statute by Act No. 310, Pub. Acts 1907, so repeal the prohibition that contracts made during the time when the act of 1903 was in force could be enforced after the amendment; as the amendment is not a curative act, containing no repealing clause, and the provision in question was not in the nature of a penalty. *Id.*

7. While contracts made in violation of law are void, where the legislature has imposed a penalty for the infraction of it, the penalty excludes any implication of an additional penalty. *Id.* 400.

8. Act No. 285, Pub. Acts 1909, providing that no female shall be employed in any factory, mill, store, shop, or warehouse more than 10 hours in any day, or 54 hours a week, is a valid exercise of the police power, and does not violate the fourteenth amendment of the Constitution of the United States, by improperly restricting the right to contract. *Withey* v. *Bloem*, 419.

9. That women, employed in establishments where perishable products are preserved, are excepted from the operation of the statute, does not invalidate it, as class legislation; the

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CONSTITUTIONAL LAW—Continued.

exception being reasonable and founded on a substantial distinction. *Id.*

10. Act No. 8, Pub. Acts 1909, which permits service of process on the agent of a foreign corporation, in cases arising outside the jurisdiction, merely gives a remedy which did not exist under 3 Comp. Laws, §§ 10442, 10443, without affecting the vested rights of the foreign corporation, and the act is constitutional and applies to a cause of action that was in existence when the statute went into effect. *Daniels* v. *Detroit, etc., R. Co.*, 468.

11. Whether Act No. 291, Pub. Acts 1909, gives too wide a latitude to the sales which a wholesaler may make, is a legislative, not a judicial, question. *Boos* v. *Scudder*, 678.

See ACTION; CRIMINAL LAW (7, 12, 14, 17, 34); ELECTION OF REMEDIES (3); EMINENT DOMAIN; HIGHWAYS AND STREETS (3, 5, 6); PROCESS (4); RAILROADS (1).

CONSTRUCTION OF BOND—See BONDS (4).

CONSTRUCTION OF CONTRACT—See INSURANCE (4).

CONSTRUCTION OF EVIDENCE—See WILLS (16).

CONSTRUCTION OF STATUTES—See STATUTES (2).

CONSTRUCTION OF WILLS—See ESTATES OF DECEDENTS (8); TRUSTS (3).

CONTINGENT REMAINDERS—See PERPETUITIES (2); REMAINDERS.

CONTINUANCE—See CRIMINAL LAW (7); TRIAL (5).

CONTRACTS.

1. An injunction will not issue upon a bill of complaint of a drug manufacturer to prohibit a corporation engaged in the sale of drugs, from buying a medical preparation, made under a secret process, from dealers or jobbers who are under contract to sell the article at a fixed price to accredited agents of the manufacturer, and from retailing the preparation at a price lower than that fixed by a system of contracts between the manufacturer and the dealers throughout the country, since the contracts and system operate as an unreasonable restraint upon competition. Following *Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 82 C. C. A. 58 (12 L. R. A. [N. S.] 135). *W. H. Hill Co.* v. *Gray & Worcester*, 12.

2. The fact that an article of commerce not patented is sold under a trade name or in trade dress affords it no exemption from the common law or statutory rules against restraint of trade. *Id.*

3. Under the common law it is no defense to an action upon a contract which is in itself legal and valid, that the plaintiff is a trust, monopoly, or combination in restraint of trade. *International Harvester Co. of America* v. *Eaton Circuit Judge*, 55.

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CONTRACTS—Continued.

4. The defense that a foreign corporation is an illegal combination or trust, within the meaning of Act No. 255, Pub. Acts 1899, or Act No. 329, Pub. Acts 1905, is not available to a defendant in an action of assumpsit for money had and received for the benefit of the plaintiff, in a transaction untainted by illegality. *Id.*

5. A contract for the furnishing of 2,500 grapevines to be set out on the farm of defendant, to be cultivated and tended by him for half the fruit, stipulating that the plaintiff should replace any vines which might die within two years, and that at any time within three years defendant might purchase plaintiff's interest in the grapevines at a specified price, does not warrant a demand for interest on the price named in the agreement, and such demand, accompanied by a refusal to replace, at the time stated in the agreement, the vines which might die, unless defendant should pay the interest, constituted a breach of the contract, and justified defendant in rescinding. *Pearce* v. *Alward*, 313.

6. The agreement to replace dead vines was a dependent and concurrent agreement, not an independent condition going to but part of the consideration. *Id.*

7. Offers of the plaintiff to perform the condition, after he had committed a breach thereof, were ineffectual to restore his rights under the contract. *Id.*

8. That defendant could not place plaintiff *in statu quo* did not affect his remedy of rescission. *Id.*

9. A third person for whose benefit a contract is made, except in case of provisions for children under a marriage settlement, may not enforce performance in an action at law, or by suit in equity. *K. O. T. M. M.* v. *Sharp*, 450.

10. No liability attaches to a son for medical services and attention rendered to his father, except by express agreement or by virtue of 3 Comp. Laws, § 4487, providing for the maintenance of indigent persons by their children, as required by the directors of the poor, and providing for the method of procedure for determining their liability. *Schwanz* v. *Wujek*, 492.

11. But the case should have been submitted to the jury under plaintiff's evidence, disputed by defendant's testimony, that the son promised to pay for the services. *Id.* 493.

See BONDS (1); CARRIERS (1–4); CHATTEL MORTGAGES (1–3); COMPROMISE AND SETTLEMENT; CONSTITUTIONAL LAW (2, 3, 5–7); CORPORATIONS (8); EASEMENTS (14); ESTATES OF DECEDENTS (5); EVIDENCE (11); FRAUDS, STATUTE OF; INSURANCE (4, 6, 9–11); MUNICIPAL CORPORATIONS (1); PARTIES (1); PARTNERSHIP (1, 2); PLEADING (5); PRINCIPAL AND AGENT (2); SALES (1); SPECIFIC PERFORMANCE (2).

Enforcement of, by third parties, see INSURANCE (10, 11).

CONTRACTS, FREEDOM OF—See CONSTITUTIONAL LAW (8).

CONTRADICTORY STATEMENTS—See WILLS (5).

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CONTRIBUTORY NEGLIGENCE — See CARRIERS (4); MASTER AND SERVANT (8); NEGLIGENCE (1); STREET RAILWAYS.

CONVEYANCES — See ADVERSE POSSESSION (7); DEEDS (1); EASEMENTS (3, 4); REFORMATION OF INSTRUMENTS (3).

CORPORATE POWERS—See CORPORATIONS (11).

CORPORATIONS.

1. A proposed amendment to the articles of association of a corporation providing for the issuance of additional capital stock, to be known as option stock, to be issued to employés, subject to the right of the corporation to repurchase it on specified terms, operates as an unlawful restraint upon the right of transfer, and is unauthorized by statute. Act No. 317, Pub. Acts 1905. *Lufkin Rule Co.* v. *Secretary of State*, 30.

2. Where the articles of association of a corporation state a purpose for which the statute authorizes a corporation to be formed, then, if other requirements of the law are complied with, it is not only a corporation *de facto* but is a corporation *de jure*, whose organization cannot be attacked or dissolved except for misuser; and then, only by a direct proceeding by the State to test its right. *International Harvester Co. of America* v. *Eaton Circuit Judge*, 55.

3. That a plaintiff is a corporation and is doing business under the name of the "Imperial Curtain Company," is *prima facie* evidence of its due incorporation, in an action of assumpsit by a foreign corporation. 3 Comp. Laws, § 10194. *Imperial Curtain Co.* v. *Jacob*, 72.

4. The statute applies to both foreign and domestic corporations. *Id.*

5. The plea of the general issue is an admission that plaintiff, suing as a corporation, is properly incorporated. *Id.*

6. It was unnecessary to allege the incorporation of plaintiff, a foreign corporation, under any particular State law. *Id.*

7. A foreign corporation cannot recover for such local business without being authorized to do business in Michigan, under Act No. 206, Pub. Acts 1901, as amended by Act No. 34, Pub. Acts 1903, and Act No. 310, Pub. Acts 1907. *Id.* 78.

8. Liability of defendant company for merchandise furnished by plaintiff to its predecessor corporation, is established by evidence that defendant's president negotiated the transfer of corporate assets to the defendant from its predecessor under an arrangement to pay plaintiff's claim; that defendant accepted the benefit of the president's agreement and purchased the plant and property of its predecessor, including the property furnished by plaintiff; that the president of defendant later promised to pay the obligation to plaintiff, who accepted his proposition. *James B. Clow & Sons* v. *Dowagiac Gas Co.*, 434.

9. A foreign railroad company, lawfully doing business in this State, is subject to such changes as may, from time to time,

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CORPORATIONS—Continued.

be made in the law touching service of process. *Daniels* v. *Detroit, etc., R. Co.*, 468.

10. Under provisions in a corporate charter authorizing the company "to issue bonds and secure the same by mortgage, pledge, deed of trust or otherwise," the corporation had authority to issue bonds and pledge them to secure a debt evidenced by a corporate note. *Union Trust Co.* v. *Electric Park Amusement Co.*, 687.

11. Mortgage bonds of the par value of $38,000 were a proper subject of pledge by the managing directors of the corporation, to secure a debt of $30,400, notwithstanding a resolution of the stockholders limiting the price at which the bonds could be sold to ninety per cent. of the par value. *Id.*

12. A pledge of such bonds was valid under a resolution of the board of directors purporting to be adopted at a duly called meeting at which two of the directors attended, without any notice to the third director who held only a nominal amount of stock, lived in a different State, and never attended the corporate meetings, where the two directors conducted all the corporate business, obtained funds by means of the loan, and where the corporation acquiesced in their act for two years without objection. *Id.*

See CONSTITUTIONAL LAW (3–6, 10); EVIDENCE (4, 5); PLEDGES; PROCESS (1, 7, 8); RECEIVERS (1).

CORRESPONDENCE—See CRIMINAL LAW (25); EVIDENCE (1, 10); FRAUD (8).

COSTS.

1. A judgment of $100, in an action of malicious prosecution, warrants the award of costs in favor of plaintiff under 3 Comp. Laws, § 11257, since justices of the peace have no jurisdiction of that form of action. *Krzyszke* v. *Kamin*, 290.

2. A defendant who files a consent to a judgment (3 Comp. Laws, § 10084), for the amount plaintiff is entitled to recover, should be awarded all costs made thereafter. *Baars* v. *Township of Laketon*, 665.

See DIVORCE (1); RECEIVERS (3).

COURT RULES—See APPEAL AND ERROR (7).

COURTS—See EQUITY (2, 7); LARCENY (4); PROCESS (1).

COVENANTS—See CONTRACTS (6).

CREDITOR'S SUIT.

Under evidence that a mortgage to one of the defendants was executed upon the property covered by execution, while action was pending between the complainant and his debtor, for the amount of the claim, that the money was paid over after judgment, and that defendants had stated that they had fixed matters so he could not collect his judgment, where they could not satisfactorily explain what became of the

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CREDITOR'S SUIT—Continued.

consideration of the transaction, sufficiently supports the determination of the trial court that the conveyance was fraudulent. *Shepard* v. *Schrutt*, 486.

CRIMINAL LAW.

1. Prejudicial error does not result from permitting a witness to give his opinion that a person whom he saw on the night the alleged crime was committed was respondent, and afterwards striking it out on discovering, from further examination, that he had no sufficient basis for the opinion. *People* v. *Stewart*, 1.

2. It was not error to submit the case to the jury under evidence that respondent, charged with arson, alighted from a car just before the fire, near the place of it, and that the conductor of the car knew her, and that she got on another car about two hours later, and subsequently denied, to the sheriff, having alighted from the car at the point described. *Id.*

3. Identity is not necessarily to be proved by direct evidence, but may be established by circumstances pointing to one person. *Id.*

4. That conflicting testimony as to the time of the fire was introduced, a part of which, given by respondent's witnesses, tended to show that she could not have set the fire in the time which she had, did not require the direction of a verdict. *Id.*

5. *Held* that the testimony of the conductor of a car, who identified respondent, was for the jury. *Id.* 2.

6. After learning, upon an investigation, that a juror, engaged in the trial of a prosecution for assault with intent to murder, had stated publicly in a saloon during the trial that when he was on a jury and got his mind made up, it would take more than they then had to change it, the court properly discharged the jury, and continued the case to the next term of court. *People* v. *Sharp*, 79.

7. The first trial, resulting in a continuance because the juror was disqualified, did not constitute a former jeopardy. *Id.*

8. It was proper for the trial judge to permit such cross-examination of respondent's wife, who was offered by him as a witness, as would enable the jury to discover her true character and to judge of the weight which they should give to her testimony. *Id.*

9. Where the defense was that the respondent had learned of improper relations between his wife and the complaining witness, and had attacked and shot the latter while temporarily deranged, error was not committed in receiving evidence of previous improper conduct, offered in good faith by the prosecutor who expected to prove knowledge of the same by respondent, but failed to show such knowledge, the testimony being stricken out by the court, although no reference was made to the withdrawal of the evidence in charging the jury. *Id.*

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CRIMINAL LAW—Continued.

10. Impassioned argument by the prosecuting attorney is not reversible error, unless it is unwarranted by the evidence and probably contributed to the result. *Id.*

11. Any possible error in the refusal of requests to charge, and in the court's charge concerning the crime of assault with intent to murder, was cured by a verdict convicting respondent of the lesser charge of assault with intent to do great bodily harm less than murder. *Id.*

12. In a prosecution for a violation of the local-option act, it is an invasion of respondent's constitutional right to a trial by jury for the court to instruct the jury that it is their duty to render a verdict of guilty, and, without permitting them to retire or deliberate, direct the clerk to take the verdict. *People* v. *Doyle*, 160 Mich. 423 (125 N. W. 358). *People* v. *Curry*, 180.

13. In a prosecution for assault with intent to kill and murder, a verdict signed and sealed by the jury before they separated, reading as follows: "Assault with intent to do great bodily harm, less than the crime of murder," was a sufficient statement of the conclusion. *People* v. *Duffek*, 196.

14. No substantial or prejudicial change was made by the jury's opening the sealed verdict, with the permission of the trial court, after reassembling, and prefixing the phrase, "We, the undersigned jurors, find the respondent, Andrew Duffek, guilty of." *Id.*

15. While 3 Comp. Laws, § 11960, requires jurors in a case involving a prosecution for murder to remain together from the time they are elected until they render their verdict, no rule or statute prohibits them from separating in other classes of criminal cases. See Act No. 4, Pub. Acts 1909, amending § 11960. *Id.*

16. Whether or not a jury has separated after signing and sealing but before returning their verdict in court, it is the right of any juror to refuse to assent publicly to the verdict which is announced. *Id.*

17. No constitutional right of the accused is infringed by the jury's being permitted to separate after agreeing upon, sealing, and delivering to the officer having them in charge, a verdict to which they afterwards assent publicly in court. *Id.* 197.

18. Although 1 Comp. Laws, § 1021, requires, in criminal prosecutions before justices of the peace, that the cause be tried within 30 days, in order that the accused may have a speedy trial, an adjournment for more than 30 days, on the application of the respondent and upon a sufficient showing, does not oust the justice of jurisdiction, whether or not the prosecuting attorney consents. *People* v. *Parsons*, 329.

19. To charge that the employer of an unmarried woman got himself into a scrape by borrowing instruments of a physician and committing an abortion on her, imputes a want of chastity to her. *Id.*

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CRIMINAL LAW—Continued.

20. A statement of such language in the information sufficiently charges an offense, without negativing the possibility that she might have been recently divorced, and the averment that she was an unmarried woman was sufficient to negative the idea that she became lawfully pregnant. 3 Comp. Laws, § 11762. *Id.* 330.

21. It was immaterial that no evidence of the falsity of the slanderous words was introduced on the first trial before a justice's jury, which disagreed, where the prosecutor offered sufficient evidence of the untruth of the words upon a second trial before the justice without a jury. *Id.*

22. Irregularities in the docket entries of a justice of the peace, in a prosecution for slander, not affecting the merits of the case and consisting of an omission to note an adjournment in the justice's docket, to enter the plea of the accused, and to enter the offense charged by the complaint, do not justify discharging the respondent on certiorari, where the defects are supplied by averments of the application for certiorari and the respondent had a fair trial and was justly convicted. *Id.*

23. A judgment of the justice that respondent "should pay a fine of $50 and costs," sufficiently requires payment forthwith. *Id.*

24. In a prosecution for burglary, evidence was properly admitted showing that burglars' tools and implements were found on three other persons with whom respondent was arrested on the night of the alleged crime, of which the three had been previously convicted. *People* v. *Freelmame*, 336.

25. A letter from one in jail, accused of a crime, written to his wife, containing incriminating admissions and obtained by prearrangement between the sheriff and an acquaintance of respondent who visited him in jail and promised respondent to deliver the communication to the wife, but turned it over to the sheriff, is not a privileged communication under 3 Comp. Laws, § 10213. *People* v. *Dunnigan*, 349.

26. While a confession obtained by improper threats or promises that may lead the accused to think it is for his interest to make a confession, regardless of its truth or falsity, is inadmissible, the letter was not subject to such objection. *Id.*

27. In a prosecution for assault and battery, in which respondent took the stand, it was within the discretion of the circuit court to permit the prosecutor to cross examine the respondent as to the details of a former conviction for another offense. *People* v. *Yund*, 505.

28. While the prosecuting attorney improperly stated, in argument to the jury, that if they convicted respondent on appeal from a conviction in justice's court, they would do only what another jury had done, the misconduct was not reversible error, where the circuit judge corrected the effect of it at the time, and advised the jury that no weight should be given to the result in justice's court. *Id.*

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CRIMINAL LAW—Continued.

29. While it was error for the circuit judge to omit to instruct the jury as to reasonable doubt and the presumption of innocence, a just conviction will not be reversed for such omission which is not brought to the court's attention by exception or request to charge. *Id.*

30. The right of appeal is statutory, and review and reversal for an error not raised in accordance with the statutes and rules of practice, is not a right of a defendant, but may be discretionary with the court, although such discretion is seldom exercised. *Id.*

31. It is not a sufficient ground of objection to the jurisdiction of the court, that respondent was arrested for drunkenness on the street without a warrant, when he has submitted himself to the jurisdiction of the court by a plea of guilty. *People* v. *Loverie*, 514.

32. Evidence tending to show that respondent was intoxicated on the street of a village, that the sheriff followed and arrested him upon private property, warrants a conviction for drunkenness under 3 Comp. Laws, § 11736. *Id.*

33. In the absence of a request for more ample instructions, the court's charge to the jury that the charge of being drunk signified such a condition as is induced from the excessive use of intoxicating liquors, and that the jury should determine the question from their common knowledge of its meaning, is sufficient. *Id.*

34. Mandamus will not issue to compel a circuit judge to vacate an order discharging a respondent accused of violating the local-option law, where it appeared that respondent stood mute, a plea of not guilty was entered, a jury selected and sworn, and the testimony for the people had been partly introduced, after which respondent was discharged on the ground that prohibition was not duly adopted in Benzie county; since he had been placed in jeopardy for the offense with which he was charged. *Paul* v. *Benzie Circuit Judge*, 543.

See ABATEMENT AND REVIVAL (1); APPEAL AND ERROR (3–5); ARSON; ASSAULT AND BATTERY; BURGLARY; LARCENY; NEW TRIAL (1); TRIAL (1).

CRIMINAL SLANDER—See CRIMINAL LAW (19–22).

CROSS-BILL, WITHDRAWAL OF—See DIVORCE (7, 8).

CROSS-EXAMINATION—See ASSAULT AND BATTERY; CRIMINAL LAW (8, 27); TRIAL (9); WILLS (11); WITNESSES (1).

DAMAGES.

1. Instructions to the jury which permitted the jury to find, as damages, the difference between the actual value of the stock and the value it would have had if it had been as represented, not exceeding the amount paid for it, were not prejudicial to defendant's rights. *Steele* v. *Kellogg*, 133.

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DAMAGES—Continued.

2. Where money is obtained by fraud and deceit interest may be added as compensation. *Id.*

3. The expense of hiring a special train may be recovered of a carrier for failure to make a promised connection, where the ticket agent was informed in advance of the necessity and purpose of arriving on time. *Hayes* v. *Wabash R. Co.*, 174.

4. In an action by an administrator for the wrongful death of defendant's employé, neither damages for loss of time or pain and suffering, caused by his injury prior to his death, are recoverable, where the cause of action arose under Act No. 89, Pub. Acts 1905, limiting the amount recoverable to the pecuniary loss suffered by those who were entitled to share in his estate. *Ingersoll* v. *Detroit & Mackinac R. Co.*, 268.

5. Although deceased had a wife and infant whom he had abandoned before his death, and whom he never supported, the law imposed upon deceased a duty to support them and the administrator was entitled to recover for their benefit the probable amount of contributions, whether voluntary or forced, that the widow and child might be expected to have received from him during his expectancy. *Id.*

6. Although defendants' witnesses testified that a motor furnished under a contract with plaintiff was defective and worthless, and there was no evidence of value except the value as claimed by plaintiff's witnesses, and the fact that defendant made use of and retained the motor, the trial judge erred in charging the jury as to defendants' claim of recoupment that they must, under the evidence, find it was worthless, or of the value shown by plaintiff's testimony. *H. J. Reedy Co.* v. *Cameron*, 688.

See EASEMENTS (11); FRAUD (11); HIGHWAYS AND STREETS (1, 2, 4); INTOXICATING LIQUORS (3); MALICIOUS PROSECUTION (2); TRIAL (7, 8).

DAMNUM ABSQUE INJURIA—See HIGHWAYS AND STREETS (3).

DANGEROUS ARTICLES—See MASTER AND SERVANT (17, 18).

DEATH—See ABATEMENT AND REVIVAL (1, 2).

DEATH BY WRONGFUL ACT—See DAMAGES (5).

DEBTOR AND CREDITOR—See ASSIGNMENTS (1); CORPORATIONS (8); ESTATES OF DECEDENTS (1, 2, 4); RECEIVERS.

DECREE—See APPEAL AND ERROR (16); JUDGMENT (1, 2).

DEED AS MORTGAGE—See MORTGAGES (1).

DEEDS.

1. The description in a deed of a parcel of land known as the William Rowley farm, sufficiently identified by the evidence, is a sufficient conveyance of the premises, although it contains also an erroneous description by governmental subdivisions: the mistaken portion of the deed must be re-

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DEEDS—Continued.

jected, and remainder be treated as controlling, in an action at law. *Tuthill* v. *Katz*, 618.

2. False and impossible parts of descriptions in conveyances may be rejected if by doing so a good description remains. *Id.*

3. Parol evidence may be resorted to in applying a deed to its subject-matter, in an action of ejectment, if the description is ambiguous. *Id.*

4. Defendants in ejectment who claim to be in possession of real property, gain no additional rights by virtue of a tax deed from the State, if they have failed to serve the statutory notice, which is held to be a condition precedent to the vesting of title under tax proceedings. *Huron Land Co.* v. *Robarge*, 128 Mich. 686 (87 N. W. 1032). *Id.* 619.

5. Where a decedent executed deeds several years before her death, telling the attorney who prepared them that when she died everything would be all right, and kept them in a safe in which she deposited her will, afterwards executed, and where she told her son to have the deeds recorded after her death, but kept control of them herself, in the safe, no sufficient delivery was shown, although the son placed the instruments on record after her decease. *Stubman* v. *Modrack*, 667.

See EASEMENTS (8, 11, 14); JUDGMENT (2); RAILROADS (2); REFORMATION OF INSTRUMENTS (2, 3); WITNESSES (5).

DEFAULT—See MANDAMUS (1).

DEFECTIVE MACHINERY—See SALES (3).

DEFECTIVE MATERIALS—See MASTER AND SERVANT (6–8).

DEFENSES—See BONDS (3); CONTRACTS (3, 4); CORPORATIONS (2); FRAUD (4); INSURANCE (7, 8); PLEADING (5).

DE JURE CORPORATION—See CORPORATIONS (2).

DELAY IN DETERMINATION—See INSURANCE (15).

DELIVERY—See DEEDS (5); INSURANCE (3).

DEMURRAGE RATE RULES—See RAILROADS (1).

DEMURRER—See ABATEMENT AND REVIVAL (4).

DEPENDENT PERSONS—See DAMAGES (5).

DEPOSITIONS—See APPEAL AND ERROR (10, 11).

DESCENT AND DISTRIBUTION—See ABATEMENT AND REVIVAL (3); ESTATES OF DECEDENTS (2, 4); MORTGAGES (2).

DESCRIPTION—See DEEDS (1, 2).

DETERMINATION OF LIEN—See ATTORNEY AND CLIENT (4).

DETROIT CHARTER—See HIGHWAYS AND STREETS (6); MUNICIPAL CORPORATIONS (2); STREET RAILWAYS (2).

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DEVISES—See WILLS (14, 17).

DIRECTED VERDICT — See CRIMINAL LAW (4, 12); MALICIOUS PROSECUTION (3); MASTER AND SERVANT (1, 4); NEGLIGENCE.

DIRECTORS—See CORPORATIONS (11).

DISCRETION—See APPEAL AND ERROR (3); CRIMINAL LAW (30); DIVORCE (5); MANDAMUS (1).

DISMISSAL AGAINST ONE DEFENDANT—See PLEADING (3).

DISMISSAL AND NONSUIT—See ELECTION OF REMEDIES (4).

DISMISSAL OF APPEAL—See APPEAL AND ERROR (16, 17).

DISMISSAL OF WRIT OF ERROR—See APPEAL AND ERROR (2).

DISQUALIFICATION OF PARTY IN INTEREST—See WITNESSES (2).

DIVORCE.

1. Although a complainant's bill for divorce against his wife was dismissed, with an allowance of costs to defendant, who appeals on the ground that the allowance was insufficient and that the court denied her cross-bill praying to have a certain contract of separation set aside, an allowance may be made for preliminary expenses and attorney's fees on motion in the appellate court. *Nichols* v. *Nichols*, 107.

2. A decree of divorce in favor of a husband for extreme cruelty of his wife, who was charged with improper conduct with other men and with threatening to kill the complainant, will be affirmed on appeal where the testimony, considered in the light of the presumption arising from the opportunity of the trial court to see and hear the witnesses, supports his conclusion. *Vollrath* v. *Vollrath*, 301.

3. After an actual separation or the filing of a bill for divorce, amicable settlements between the parties relating to their property interests are not only lawful but commendable. *Palmer* v. *Fagerlin*, 345.

4. *Held* that evidence offered by complainant against the defendant, her husband, in proceedings for divorce, did not warrant a decree on the ground of extreme cruelty. *Cheyney* v. *Cheyney*, 598.

5. In proceedings for divorce, in which both parties pray for relief, and the wife asks for separate maintenance, the form of decree rests in the sound discretion of the court. Act No. 185, Pub. Acts 1905, as amended by Act No. 324, Pub. Acts 1907. *Coon* v. *Coon*, 644.

6. It is the settled rule in this State to grant an absolute divorce instead of separate maintenance, for reasons of public policy. *Id.*

7. A wife, defendant in divorce proceedings, who has filed a cross-bill praying for separate maintenance, may, on motion made after the court has announced its determination but before

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DIVORCE—Continued.

the entry of decree, dismiss her cross-bill, unless the complainant or the public has some legal interest which would be injured by the action. *Id.*

8. And where the evidence showed that the wife had just grounds to complain, but desired not to have a divorce, and the complainant failed to sustain his charge of extreme cruelty, a decree should be made dismissing his bill, after a motion by defendant to withdraw her cross-bill. *Id.*

See APPEAL AND ERROR (16, 17); BILLS AND NOTES; EQUITY (4, 6, 8–10); JUDGMENT (1).

DOCKET ENTRIES—See CRIMINAL LAW (22).

DRAINS—See APPEAL AND ERROR (1).

DRIVEWAY—See ADVERSE POSSESSION (1, 4).

DRUNKENNESS—See CRIMINAL LAW (31–33).

DUTY TO INSPECT—See MASTER AND SERVANT (4).

DUTY TO RENDER SERVICE — See TELEGRAPHS AND TELEPHONES.

EASEMENTS.

1. Where the grantor of lands, which have no access to a highway, owns the intervening realty, over which a right of way has existed to the highway, a way of necessity along the existing route, passes to the grantee. *Bean* v. *Bean*, 880.

2. An easement or way of necessity will pass by implication as well where the severance of dominant and servient estates is effected by legal proceedings as where the grant is voluntary, and it passes with each successive transfer of title. *Id.*

3. When the owner of an entire estate makes one part of it visibly dependent for the means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises. *Id.*

4. Whether the grantor of the premises owns the passageway or has a right to its use by prescription, as an appurtenance to the dominant estate, the right passes with the grant. *Id.*

5. An attempt to secure a passageway to the highway in another direction by agreement with an adjacent proprietor, does not defeat the way by necessity where the proposed new route proves to be impassable and worthless. *Id.*

6. A prayer in defendants' cross-bill that the decree declare an easement to exist along the east side of complainants' property may be considered as amended so as to meet proof that a marsh obstructed the passageway and required that the route pass around it, and a decree may be entered accordingly. *Id.*

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EASEMENTS—Continued.

7. An injunction will not be granted to complainant, the owner of a parcel along which a private right of way runs giving access to complainant's factory, to restrain a railroad company, having rights in common in the way with him, from constructing a siding for occasional use, upon a portion of the way, so long as no use is made thereof which unreasonably interferes with complainant's rights. *Hanselman* v. *Grand Trunk Western R. Co.*, 496.

8. Under a deed by complainant to the railroad company convey ing a right to use the way "to the fullest extent which the parties of the first part have the right to make use of the same, but without in any manner, or to any extent, diminishing the right of the first parties, etc., to make use of said right of way in common" with the grantee, the railroad company obtained a right to the use of the way for any of the purposes for which such a right of way might usually be used by a railroad company, subject to complainant's joint rights. *Id.*

9. What constitutes a reasonable use of the easement is a question of fact, and is a limitation upon defendant's right of user enforceable in complainant's behalf. *Id.*

10. Since the location of the side track upon a particular portion of the easement would not of itself interfere with complainant's use of the way, he cannot compel defendant to locate the siding where he chooses to have it, although he may prevent unreasonable use of the track. *Id.*

11. By selling to defendant company the right to use the way, complainant waived any claim to statutory damages for the taking and use of the easement for railroad purposes. *Id.*

12. Complainant was the purchaser of a tax interest in a thirty-foot strip of land, over which defendant had an easement. The Murphy Chair Company furnished the consideration of the tax purchase and took the conveyance in complainant's name, for its benefit, but without any trust instrument evidencing the nature of the transaction. The title to the thirty-foot strip was held in the name of the secretary and treasurer of the chair company, subject to defendant's easement and to an easement of a third party which owned adjoining premises. Defendant's rights had been recognized by a formal deed of the chair company to defendant in connection with a separate transaction. The Murphy Chair Company held in its own right an easement over the thirty-foot strip, which connected its premises with a public street, and with a railroad right of way. The purpose of complainant's tax purchase was admitted to be that the rights of easement over the premises might be cut off. *Held*, that a suit of complainant to quiet title to the premises would be treated in equity as the suit of the Murphy Chair Company; that the statute prohibiting resulting trusts (3 Comp. Laws, § 8835), was not intended to legalize such a proceeding in fraud of rights of the defendant, and that the easement was appurtenant to property of the chair company,—not an easement in gross. *Stansell* v. *American Radiator Co.*, 528.

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EASEMENTS—Continued.

13. Easements not in gross are assessable to the owner of land to which they are appurtenant. 1 Comp. Laws, §§ 8825, 8850. *Id.*

14. Where a deed contains a provision that the grantee confirms and recognizes an easement described in the conveyance, it is as binding as would be a separate grant of the right of way by the one who accepts the instrument. *Id.*

15. And the owner of the estate to which the easement was appurtenant, owed to the defendant a duty to pay taxes assessed thereon, which duty it discharged by purchasing the tax interest in the complainant's name; nor did it acquire any additional rights by such action. *Id.*

See ADVERSE POSSESSION (1, 3, 4); PARTIES (5); RAILROADS (2).

EJECTMENT—See ABATEMENT AND REVIVAL (3); APPEAL AND ERROR (15); DEEDS (1, 3, 4); JUDGMENT (2).

ELECTION OF COUNTS—See PLEADING (3, 4).

ELECTION OF REMEDIES.

1. The commencement of an action upon one of two inconsistent claims amounts to an election, and, although the action may be discontinued and recommenced, the plaintiff may not maintain suit upon the abandoned theory. *Mintz* v. *Jacob*, 280.

2. It is not an election, which would bar a subsequent action of tort, for plaintiff to commence in assumpsit under 3 Comp. Laws, § 10421, for fraud in obtaining money through false pretenses. *Id.* 281.

3. A statute permitting a plaintiff to commence an action, based upon fraudulent representations or conduct, in assumpsit, is within the legislative authority. *Id.*

4. No estoppel arises from plaintiff's attempt to commence an action of assumpsit by capias under 3 Comp. Laws, § 9998, so as to bar or defeat a subsequent action *ex delicto* for the same fraud, after being nonsuited in the original cause. *Id.*

ELECTIONS—See PUBLIC OFFICERS (3).

ELECTRICAL MACHINERY—See EVIDENCE (8).

EMINENT DOMAIN.

Consequential injuries resulting from a separation of grades in accordance with statutory authority do not constitute a taking of private property within the meaning of the Constitution. *City of Detroit* v. *Grand Trunk Ry. of Canada*, 229.

See HIGHWAYS AND STREETS (1, 2, 5).

EQUITY.

1. Delay of over thirty years in the enforcement of a trust in real property, which, the circumstances tended to show, had been,

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EQUITY—Continued.

with the consent or acquiescence of complainant, conveyed by quitclaim deed by the trustee to third parties, bars the attempted enforcement of the trust, on the ground of laches. *Buell* v. *Menominee River Lumber Co.*, 102.

2. Complainant filed a bill for an accounting and other relief in the county of her residence, representing that in a suit by her husband to establish his interest in a corporation, a decree had been entered for the defendants; that the complainant who was the receiver in the cause, although ordered to account for property in his hands had failed to do so; that the defendants had, on motion, substituted a solicitor for their original counsel, whose lien the order of the court, made on such motion, preserved; that an issue of fact framed by said court in chancery as to the amount due defendants' solicitor was joined and determined by order of the court; that the complainant later executed a mortgage upon property in the county of Wayne to pay an alleged claim against the defendant corporation of her husband, one of the defendants who had assigned the claim to a third party, also a defendant in the suit. The bill prayed that the respective rights of the parties be determined, the order determining the amount of the solicitor's lien vacated, and the real estate mortgage be canceled. *Held* on pleas to the jurisdiction, that the Jackson circuit court has no jurisdiction over the cancellation or foreclosure of a mortgage upon real estate situated in Wayne county, and complete relief could not therefore be rendered upon the claims of the defendants based on the instrument. *Wipfler* v. *Warren*, 189.

3. After the entry of a final decree in a suit for specific performance, and after discovering that the description of land affected by the proceedings was incorrect, a second order permitting the complainant to open the decree and insert an amended description as it might be determined by a survey, obviates the objection that the final order contained an incorrect description. *Brown* v. *Brown*, 337.

4. The jurisdiction of the circuit court, in chancery, in divorce proceedings, is strictly statutory, and the court has no inherent power to decree permanent alimony. *Maslen* v. *Anderson*, 477.

5. While the statutes give the court authority to grant alimony to the wife for the support of herself and minor children, and to create a lien against the husband's property to secure its payment, they confer no power to decree the payment of any sum to the children on their reaching majority, or even during minority, or to create a lien to secure the payment of such award. *Id.*

6. In such special proceedings as divorce and partition, the courts must be considered as of limited and special jurisdiction, concerning which no such presumption is indulged as prevails in actions at common law or suits under the general equitable jurisdiction. *Id.*

7. Parties cannot confer jurisdiction over a subject matter, by

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EQUITY—Continued.

consent. upon a tribunal from which the law has withheld it. *Id.*

8. A decree, entered by consent of the defendant in divorce proceedings, providing for the payment of a stipulated sum to the wife's mother, and certain sums in a lump to the children at their majority, and creating a lien on real estate to secure the payment of the same, exceeds the jurisdiction of the court, and such provisions are void and cannot operate as a family settlement. *Id.*

9. A petition in proceedings for divorce in the Wayne circuit court in chancery, to determine the question of alimony, after the entry of a decree and the postponement by mutual consent of the question of the amount to be paid by the defendant husband to petitioner, should be brought on before the judge that heard the original cause. *Mincer* v. *Wayne Circuit Judge*, 628.

10. Mandamus will not lie to compel the judge who presides in chancery in Wayne county to hear such petition for alimony, and to enter a decree in the nature of a supplemental decree, determining the amount to be paid by the husband, when the testimony in the cause was heard by another of the judges. *Id.*

See DIVORCE (5); EASEMENTS (6); ESTATES OF DECEDENTS (9); INSURANCE (11); JUDGMENT (1); PARTIES (4, 5); RECEIVERS (3); REFORMATION OF INSTRUMENTS (2); SPECIFIC PERFORMANCE (1).

EQUITY JURISDICTION — See ATTORNEY AND CLIENT (4); DEEDS (3).

ESCROWS—See DEEDS (5).

ESTATES — See EASEMENTS (2, 3); ESTATES OF DECEDENTS (7); PARTITION; PERPETUITIES; WILLS (17); WITNESSES (4).

ESTATES BY ENTIRETIES — See HUSBAND AND WIFE; PARTIES (1).

ESTATES OF DECEDENTS.

1. It is not an advancement for a parent to loan money to certain of his children and take their notes in payment. *Olney* v. *Brown*, 125.

2. Nor is the right of such children to take an interest in real property of their father impaired by their unpaid indebtedness to the estate, upon the notes. *Id.*

3. Oral testimony is inadmissible to prove an advancement not evidenced by writing or a declaration of intent, as required by 3 Comp. Laws, § 9072. *Id.*

4. It is not permissible to adjust the indebtedness of a part of the children, so evidenced, to the estate, by depriving them of their legal estate in lands of the deceased and giving their interest to other heirs. *Id.*

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ESTATES OF DECEDENTS—Continued.

5. On the trial of a claim against the estate of a decedent for labor and services, it was proper to direct a verdict for defendant under testimony showing that claimant ceased to work for decedent more than six years before his death, that he had presented a claim against the deceased many years before, which had been compromised and paid, that deceased said to a person who appeared as a witness that he was going to give claimant his farm some day, but no evidence showed that the decedent agreed to pay claimant in money or property out of his estate, after his death, or that claimant performed any services after the alleged statements of deceased. *In re Gibson's Estate*, 502.

6. It was proper to submit to the jury, questions of fact raised by evidence in support of claimant's claim against the estate, as trustee, for expenditures and care in executing the trust, created by testator's will, which conferred upon the claimant authority to sell property if necessary to carry out its provisions. *In re Howard's Estate*, 556.

7. The use or usufruct of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy and have the fruit thereof. If the thing to be used is in the form of real estate, the use is its occupancy or cultivation or the rent obtainable for it; if it is money or an equivalent, generally speaking, it is the interest which it will earn. *Id.*

8. Whether or not the trustee had power to sell real estate, where it is undisputed that she did not sell it or attempt to do so, but necessarily incurred expense in excess of the income from the estate in her possession, she was entitled to recover, in any event, the amount which the jury might find she had so expended. *Id.* 557.

9. The claim of the trustee, presented in probate court against such estate, is properly treated, on appeal to the circuit court, as an action at law, instead of being treated as a settlement of a trustee's account, on the equity side of the court. 1 Comp. Laws, § 673, Act No. 253, Pub. Acts 1899. *Id.*

See TRUSTS (2); WILLS (13, 15); WITNESSES 2–4).

ESTOPPEL — See APPEAL AND ERROR (16, 17); CORPORATIONS (12); ELECTION OF REMEDIES (4); PARTNERSHIP (2); TRUSTS (4).

EVIDENCE.

1. A witness was properly allowed to explain what he meant by stating in a letter that he had agreed with plaintiff relative to the subscription. *Steele* v. *Kellogg*, 133.

2. It was competent to show the value of stock in a project that failed, by the opinion of one of the interested investors who was familiar with the enterprise. *Diel* v. *Kellogg*, 168.

3. A conversation of a witness with defendant, which might, though not necessarily, tend to show a sense of obligation consistent with plaintiff's claim, was competent evidence. *Id.*

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EVIDENCE—Continued.

4. Reports of business of a corporation, not supported by sworn testimony as to their correctness, are hearsay. *Id.*

5. The form in which defendant furnished information concerning the business of another corporation was not material. *Id.*

6. Since the passenger made his arrangements with the ticket agent who had apparent authority to make arrangements, evidence was inadmissible that defendant's public schedule stated that the time of arrival and departure of trains, or connections with other roads, were not guaranteed. *Hayes* v. *Wabash R. Co.*, 174.

7. In an action for the price of an elevator and motor furnished to defendants who claimed that it did not operate properly, and was worn and old, plaintiff claiming that the motor was new and that if it failed to work the fault lay in improper operation, an expert witness' opinion that it was properly operated by defendants' servants was material. *H. J. Reedy Co.* v. *Cameron*, 638.

8. An electrician of experience, who had seen the electric motor operated in connection with an elevator to which it furnished power, at twenty or thirty different times, was qualified to express an opinion as to whether it was properly operated. *Id.*

9. It was error to exclude from the consideration of the jury, an answer of defendants' expert that the motor was old, worn-out and second-hand, and the error was not cured by the fact that similar testimony of the witness appeared in another part of the record, since the action of the court might have been intended to apply to the other evidence. *Id.*

10. Letters tending to contradict the testimony of plaintiffs president, that the motor was new, first-class and the plaintiff had never been called upon to make repairs, should not have been excluded. *Id.*

11. In an action for a sum due under a contract, which defendant admitted, but claimed had been compromised by the making of a subsequent agreement in place thereof, evidence of other litigation of the defendant, and garnishment proceedings in this action affecting the other cases, was properly excluded as immaterial, although offered to show that the motive of plaintiff was fraudulent. *Weaver* v. *Murray*, 660.

See ADVERSE POSSESSION (1); ASSAULT AND BATTERY; ASSIGNMENTS (1); BURGLARY (2, 3); COMPROMISE AND SETTLEMENT; CORPORATIONS (3); CRIMINAL LAW (1–5, 9, 21, 24–26); DAMAGES (6); DEEDS (3); DIVORCE (2); ESTATES OF DECEDENTS (3); FIRES; FRAUD (3, 4, 8–11); INSURANCE (2–4, 9); INTERNATIONAL LAW; INTOXICATING LIQUORS (2); JUDGMENT (2); LARCENY (2); MALICIOUS PROSECUTION (2, 3); MASTER AND SERVANT (2); MORTGAGES (1); NEW TRIAL (2, 3); PLEADING (4); REFORMATION OF INSTRUMENTS; SALES (1, 3); WILLS (3, 5–10, 12); WITNESSES (4, 5).

Value of stolen article, see LARCENY (1–3).

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EXAMINATION—See APPEAL AND ERROR (4).

EXCEPTIONS—See APPEAL AND ERROR (3); CRIMINAL LAW (29).

EXCEPTIONS, BILL OF—See APPEAL AND ERROR (2, 7, 8).

EXECUTION.

1. It was not error to permit the sheriff to indorse the levy of the execution on real estate of the defendant, by attaching to the execution at the hearing, a statement of his proceedings thereunder; the notice of levy recorded in the office of register of deeds is a sufficient compliance with the requirement of 3 Comp. Laws, § 10203. *Shepard* v. *Schrutt*, 485.

2. Oral testimony of the sheriff and an indorsement at the hearing, showing the time when he received the execution, sufficiently met the requirements of 3 Comp. Laws, § 10309, as to indorsement of the time of receipt. *Id.*

See BONDS (1, 2); DEEDS (5); JUSTICES OF THE PEACE (1).

EXECUTORS AND ADMINISTRATORS — See DAMAGES (4).

EXEMPLARY DAMAGES—See INTOXICATING LIQUORS (4).

EXHAUSTION OF REMEDIES—See INSURANCE (12).

EXPERT TESTIMONY—See EVIDENCE (7-9).

EXPLANATION—See EVIDENCE (2).

EXPRESS CONTRACT—See CONTRACTS (11).

EXTREME CRUELTY—See DIVORCE (2, 4).

FACTS ARISING AFTER DECREE—See APPEAL AND ERROR (12).

FALSE PRETENSES—See ELECTION OF REMEDIES (2).

FEES ON FORECLOSURE PROCEEDINGS — See ATTORNEY AND CLIENT (5).

FELLOW-SERVANT — See MASTER AND SERVANT (8, 16).
Competency of, see MASTER AND SERVANT (9).

FEMALE LABOR—See CONSTITUTIONAL LAW (8, 9).

FIDUCIARY RELATIONS — See PRINCIPAL AND AGENT (2); TRUSTS (1); WILLS (2).

FINDINGS OF FACT AND LAW—See APPEAL AND ERROR (15, 18).

FIRE DEPARTMENT—See STREET RAILWAYS.

FIRE INSURANCE—See INSURANCE (1, 2, 4).

FIRES.

In an action for negligently permitting fire to escape from defendant's premises upon plaintiff's farm in dry weather, destroying his property, plaintiff was entitled to take the verdict of the jury under evidence tending to show that a wit-

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FIRES—Continued.

ness saw defendant's employés burning ties and refuse on its property, just before the 1st or 2d of August, and the plaintiff's property was destroyed when he next went by that way, a few days subsequently; and whether or not the witness was mistaken in the dates was a question of fact, where it appeared that the fire occurred on July 27th. *Leffonier* v. *Detroit, etc., R. Co.*, 635.

See PRINCIPAL AND AGENT (1).

FOREIGN CORPORATIONS—See CONSTITUTIONAL LAW (2–6, 10); CORPORATIONS (3, 6, 7, 9); INSURANCE (5); PROCESS (1–5, 7, 8).

FOREIGN STATUTE—See INTERNATIONAL LAW.

FORMER JEOPARDY—See CRIMINAL LAW (7, 34).

FORMER OFFENSES—See CRIMINAL LAW (27).

FRANCHISES—See RAILROADS (2).

FRATERNAL INSURANCE—See INSURANCE (6, 9–16).

FRAUD.

1. While statements of fact, made by a person who was not acting for the defendant or associated with him as principal, are not a proper subject of comment in the opening statement of counsel, under a declaration for fraud of the defendant in inducing plaintiff to subscribe for corporate stock, such reference was not error when the statements referred to were shown on cross-examination by the defendant's counsel, in sustaining his theory of the defense. *Steele* v. *Kellogg*, 182.

2. That the alleged representations related to a business owned by one who was not interested in the venture, would not affect plaintiff's right to recover, where the corporation to which he subscribed projected the taking over of a part of such business, to which the representations related, and the defendant was to profit by the transaction. *Id.*

3. Proof of oral representations similar in character to those alleged in the pleadings, made by defendant to third parties, was competent as having a tendency to show fraudulent intent. *Id.* 183.

4. A letter written after plaintiff had concluded the agreement, having a tendency to negative the defense that the alleged untrue statements were inadvertently made, was admissible. *Id.*

5. Opinion evidence was properly received to show the value of corporate stock that had no market value, and was not the subject of sale. *Id.*

6. Where it was claimed that defendant wrote a letter to an intermediary with whom plaintiff dealt, and that plaintiff read the letter and acted in reliance on it, the question whether plaintiff had agreed to subscribe before he saw the letter was a material issue. *Id.*

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FRAUD—Continued.

7. Whether or not defendant understood that the plaintiff had already subscribed for the stock was material in determining his intent in writing the letter which contained the false statements. *Id.*

8. Where plaintiff subscribed to stock of a corporation because of alleged false representations contained in a letter from defendant to a promoter of the enterprise, and communicated to the plaintiff, representing falsely that the product to be manufactured had been earning 12 to 15 per cent. on a capitalization of $100,000, the letter was admissible in evidence, although defendant claimed it was written for another purpose, and that the promoter was not authorized in using a single and material sentence, apart from its context, which, however, did not appear to qualify the effect of representations made. *Diel* v. *Kellogg*, 162.

9. The repetition of the alleged fraudulent statements in a subsequent letter had a tendency to refute defendant's claim that the representation was an inadvertence or mistake. *Id.* 163.

10. Evidence that the promoter, to whom defendant wrote the letter, used it to procure other subscriptions to stock of the corporation, was properly received to establish a fraudulent intent and the complicity of the promoter. *Id.*

11. Plaintiff was entitled to recover for stock which he bought after his original subscription, where the evidence tended to show that it was treasury stock, although another party had promised to take it, and, without paying for it, indorsed the certificates over to plaintiff, who paid the amount to the managing stockholder. *Id.*

See DAMAGES (1, 2); ELECTION OF REMEDIES (2–4); EVIDENCE (3, 5, 11); INSURANCE (1, 6, 7); PARTIES (1); PLEADING (1, 4); TRUSTS (1); WILLS (6).

FRAUDS, STATUTE OF.

1. A sale of personal property, of the value of $50 or more, is invalid unless there is a delivery, a part payment, or a writing signed by the party to be charged. 3 Comp. Laws, § 9516. *Johnson* v. *Morrison*, 322.

2. Part payment may be made in money or anything of value. *Id.*

3. But delivering to the owner of logs, an order on the clerks of the purchaser, for the payment of a portion of the price, did not constitute a sufficient part payment to bind the contract, where the owner, a Finn, was unable to read it, took it to an interpreter, and, on learning the contents, returned it to the buyer, and sold the logs to plaintiff. *Id.*

FRAUDULENT CONVEYANCES — See CREDITOR'S SUIT; INSURANCE (3).

FURNISHING LIQUORS—See INTOXICATING LIQUORS (1).

GENERAL ISSUE—See BONDS (3).

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GOVERNOR—See PUBLIC OFFICERS (2).

GRADE SEPARATION — See EMINENT DOMAIN; HIGHWAYS AND STREETS (1, 4, 6).

GUARANTY—See CARRIERS (2); DAMAGES (3).

GUARDIAN AND WARD—See PARTIES (2, 3).

GUEST AT HOTEL—See INNKEEPERS.

HEARSAY EVIDENCE — See ASSIGNMENTS (1); EVIDENCE (4, 6); INSURANCE (2); WILLS (10).

HIGHWAY COMMISSIONER—See PUBLIC OFFICERS (4).

HIGHWAYS AND STREETS.

1. In separating the grades of a street and railroad under 1 Comp. Laws, §§ 4229–4261, as amended by Act No. 268, Pub. Acts 1909, the municipality does not exercise the power of eminent domain, and damages are not determinable in accordance with rules governing awards in cases where private property is taken for public purposes. *City of Detroit* v. *Grand Trunk Ry. of Canada*, 229.

2. Improvements authorized by law, made by a city, in or upon public streets, impose no liability for damages resulting to adjacent property owners, unless the legislature so provides. *Id.* 230.

3. The legislature has complete control over the highways of the State and what is done lawfully upon them cannot be considered a nuisance, and consequential injuries resulting from what is done are *damnum absque injuria*. *Id.*

4. Under the statute the city of Detroit has power to make such separation of grades where railroads cross public streets, and a remedy is provided for consequential injuries to abutting property. *Id.*

5. Nor is the statute in violation of the constitutional provisions relating to the exercise of eminent domain. *Id.*

6. Act No. 268, Pub. Acts 1909, providing that in separating the grades of streets and railroads at crossings, the petition may be filed within one year after the separation is completed, has a retroactive effect and is not unconstitutional. *Id.*

7. The owner of property abutting on a street has ordinarily a right of ingress and egress to and from his property. *Goodfellow Tire Company* v. *Com'r of Parks and Boulevards of the City of Detroit*, 249.

8. The commissioner of parks and boulevards of the city of Detroit may not deny the application of an abutting property owner to construct a driveway for access from his property to the Grand Boulevard, but should grant a permit therefor, subject to reasonable regulations and requirements, under Act No. 374, Local Acts 1879, and the amendments thereto. *Id.*

See MUNICIPAL CORPORATIONS (2); STREET RAILWAYS (1).

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HUSBAND AND WIFE.

In real property held by husband and wife by the entireties, neither has an undivided interest, but the estate is an entirety which is not defeated or affected by the act or conveyance of either. *Lang* v. *Prindle*, 256.

See BILLS AND NOTES; CRIMINAL LAW (25, 26); DAMAGES (5); EQUITY (6); INSURANCE (3, 9, 10); PARTIES (1); WITNESSES (3).

IDENTITY—See CRIMINAL LAW (1-3, 5).

IDENTITY OF PROPERTY—See BURGLARY (1, 2).

IMPEACHMENT OF WITNESS—See EVIDENCE (10); WILLS (5)

IMPROVEMENTS—See HIGHWAYS AND STREETS (1, 2).

INCONSISTENT THEORIES—See ELECTION OF REMEDIES (1).

INCORPORATION—See CORPORATIONS (3, 5, 6).

INDICTMENT AND INFORMATION—See ARSON; CRIMINAL LAW (20).

INDIGENTS—See CONTRACTS (10).

INDORSEMENT OF LEVY—See EXECUTION (1).

INFANTS—See EQUITY (5); PARENT AND CHILD; PARTIES (2, 3).

INJUNCTION—See CONTRACTS (1); EASEMENTS (7); MALICIOUS PROSECUTION (1); PARTIES (5); SPECIFIC PERFORMANCE (1).

INNKEEPERS.

1. Under the statute limiting the liability of hotelkeepers for the loss of property of their guests (Act No. 42, Pub. Acts 1905), the question of the suitability of the lock on the door of plaintiff, who occupied a room with another, and whose watch and charm were stolen, while, as plaintiff claimed, the other guest was absent from the room, was for the jury, upon a record which showed there was only one key for the lock and the guest who left the room, did not lock the door. *Weadock* v. *Swart*, 602.
2. A gold watch and chain in habitual use by a guest are not jewelry, or personal ornaments, or articles of gold and silver manufacture, within the intent of Act No. 42, Pub. Acts 1905, limiting the liability of innkeepers who maintain a safe or vault for the deposit of articles of the character described, when the guest shall not offer to deliver the articles for custody in the safe or vault. *Id.*

INSTRUCTIONS—See APPEAL AND ERROR (3, 5); COMPROMISE AND SETTLEMENT; CRIMINAL LAW (12, 29, 33); DAMAGES (1); INTOXICATING LIQUORS (3, 4); MASTER AND SERVANT (15); PLEADING (4); TRIAL (1, 4, 7, 8); WILLS (4).

INSURANCE.

1. In an action on a fire insurance policy, in which defendant

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INSURANCE—Continued.

claimed a change in the title to the insured property, and fraud of the insured, *held* that a verdict for the plaintiff was supported by sufficient evidence. *Goodwin* v. *Union Ins. Co. of Philadelphia*, 41.

2. While the proofs of loss are inadmissible, if unsupported by testimony of their correctness, to show the value of the property destroyed, it was not error to receive them as evidence of compliance with the policy, or as evidence of the value, after the plaintiff had used them to refresh his recollection and had testified to the correctness of the items. *Id.*

3. It appearing that plaintiff had conveyed the property to his wife previously to the fire, and had placed the bill of sale on record, a showing that he had done so without the knowledge of his wife, to conceal the property from his creditors, tended to rebut the presumption of delivery and raised an issue of fact for the jury. *Id.*

4. It was proper to charge the jury that certain riders attached to the insurance policy might be considered in determining whether or not the insured had informed the agent as to the true state of the title. *Id.*

5. The court will not assume, without proof, that the jury was prejudiced against the defendant because it was a foreign corporation. *Id.* 42.

6. Deceased applied for admission to a fraternal beneficiary order, representing that he was a polisher. In accordance with the rules of the association he underwent a medical examination and stated in a subsequent application that his occupation was drawing dirt and he had no regular employment. The representations were true at the time. A committee of defendant having investigated his standing and the truthfulness of his representations, recommended his admission to the society. In the benefit certificate thereafter issued to the insured, a clause provided that the statements of the first application for membership should be warranties in the contract. At the time of his death the insured worked as a metal polisher, an occupation prohibited to members of the order. *Held*, that the preliminary application truly stated the occupation of the insured, and that, after an investigation of the facts, the receipt of dues and premiums during the lifetime of insured estopped the defendant from questioning the validity of the policy on the ground of fraud. *Lessnau* v. *Catholic Order of Foresters*, 111.

7. A notice of fraud in procuring the policy of insurance, under a plea of the general issue, relieves the plaintiff of the necessity of showing that due proofs were furnished of the death of insured or that he was a member of the order in good standing at the date of his decease. *Id.* 112.

8. It was not error, in an action that had been pending for more than a year, after the trial of the case had continued for some time and defendant entered upon its defense, for the court to deny an application of defendant to amend its notice of defense by inserting an allegation that deceased had

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INSURANCE—Continued.

changed his occupation after the issuance of his benefit certificate and had thereby invalidated his policy. *Id.*

9. Evidence *held* not to show that deceased and his wife, who each took out a policy in a fraternal benefit society, payable to the other, agreed that, after the death of either, their children should become beneficiaries under the policy then remaining in force, and that no change in beneficiary should be made by the surviving parent. *K. O. T. M. M.* v. *Sharp*, 449.

10. Children of the deceased husband, who, under the rules of the insurer, became the contract beneficiaries, after their mother, who was named as beneficiary, died, were entitled to assert the claim that the father was incompetent to afterwards change the beneficiary named in the policy, by the substitution of his second wife. *Id.* 450.

11. If such contract not to change beneficiaries was, in fact, made, no promise being made to any of the children in interest, no fund being in existence nor trust created, and the policy having no paid up value, it was revocable at any time, and the children could not enforce its performance by a suit in equity. *Id.*

12. A clause in a fraternal benefit insurance policy, providing that no action shall be maintained on the certificate until after the proofs of death have been filed and passed upon by the board of directors, is a valid limitation, and is a condition precedent to the right of action. *Larkin* v *Modern Woodmen of America*, 670.

13. Under the by-laws of a fraternal beneficiary society, prohibiting any officer or local camp official from waiving the provisions of a policy of insurance, and declaring that the clerk of a local camp is not the agent of the head camp, the clerk of a local camp could not waive the by-laws of the great camp, relating to the exhaustion of remedies within the order. *Id.*

14. It did not amount to a waiver of the condition precedent, that the clerk of a local camp told the plaintiff if she would pay a part of the amount received to her daughter-in-law, the claim would be allowed, when it appeared that she rejected the proposition and lost nothing in reliance on it. *Id.*

15. The board of directors may not arbitrarily and indefinitely postpone action on a claim, and thereby defeat the beneficiary's right of action, although the by-laws fix no time within which they shall act. *Id.* 671.

16. Nine months is not an unreasonable time for the board of directors to take in passing on a claim which they had caused to be investigated and found reason to believe was invalid for breach of a condition in the insurance policy against the excessive use of intoxicating liquors. *Id.*

INTENT—See ESTATES OF DECEDENTS (3); FRAUD (3, 7, 9); WILLS (16).

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INTEREST—See DAMAGES (2).

INTEREST OF AGENT—See PRINCIPAL AND AGENT (2).

INTEREST OF PARTY—See FRAUD (2).

INTERNATIONAL LAW.

The court cannot take judicial notice of a statute of limitations of the Dominion of Canada; it must be proved. *Daniels* v. *Detroit, etc., R. Co.*, 468.

See ACTION.

INTERSTATE COMMERCE—See CONSTITUTIONAL LAW (1-4); CORPORATIONS (7); RAILROADS (1).

INTOXICATING LIQUORS.

1. *Quære:* Does it constitute an unlawful furnishing of liquor, under the local-option law, for several persons in a county where the law is in force to contribute to a fund for the purchase of beer from a county where it may be sold, and to help themselves from the quantity purchased and held in common? *People* v. *Curry*, 180.

2. Evidence that plaintiff's husband procured intoxicating liquor of defendant through the agency of her minor son, who testified that he thought the husband took a drink at the time, with testimony that he was intoxicated on the same day and soon afterwards, that he was an habitual drunkard, and had been drinking for several days, warrants the submission to the jury of the question whether he drank any of the liquor provided by defendant. *Ryerson* v. *Phelps*, 237.

3. A request to instruct the jury, that if the defendant had stated in a sworn bill of complaint, filed by her, that her husband had been a drunkard since they were first married, and had committed acts of violence similar to the assault complained of in the declaration, she could not recover damages for mental anguish, loss of companionship, shame, etc., was properly refused, since it excluded her recovery for mental anguish, shame and mortification, growing out of the assault alleged in the pleading, and for the resulting disfigurement to plaintiff. *Id.* 238.

4. That the trial court in his charge unduly emphasized the question of exemplary damages was not shown to be prejudicial where the verdict was small, and there was ample evidence warranting exemplary damages. *Id.*

5. Under Act No. 291, Pub. Acts 1909, it is not within the province of a village council to reject a liquor dealer's application for a license on the ground that he had sold liquor to school children. *Hanold* v. *Com. Council of Village of Stambaugh*, 242.

6. The writ of mandamus will issue to compel the village council to reconsider an application to conduct a retail liquor business and to vacate its proceedings in approving the application and bond of another liquor dealer, filed after the date of

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INTOXICATING LIQUORS—Continued.

relator's application, which was rejected on the ground of moral unfitness, where the number of saloons is limited to nine by law, and nine applications, including the one to be vacated, have been granted. *Id.*

7. A village ordinance enacted under 1 Comp. Laws, § 2769, and prohibiting any person from conducting a saloon or bar for the sale of intoxicants, does not preclude the wholesaling of liquors, except such as may be sold in a saloon or at a bar. *Boos* v. *Scudder*, 679.

8. The word saloon, as used in the statute, refers to places where persons come to buy liquor to be drunk on the premises. *Id.*

9. Prohibition of saloons and saloon bars in a village, by ordinance, is no justification for refusing to grant a license to a wholesale liquor dealer. *Id.*

10. Mandamus will not issue to compel a village council to grant a liquor dealer's license, where it was found by the lower court that the council adjourned at once after the application and bond were filed under a pending motion to adjourn, and had not sufficient time after filing to consider the matter. *Id.*

11. Nor will the writ compel the granting of a license which, on the face of the application, will authorize the sale of spirituous or intoxicating liquors in the barroom of a hotel, in such village. *Id.*

12. The Warner-Cramton Act (Act No. 291, Pub. Acts 1909) did not repeal the general village law, or prevent villages from suppressing saloons under the prior statute. *Id.*

See CONSTITUTIONAL LAW (11); CRIMINAL LAW (12, 34); MANDAMUS (2).

JEWELRY—See INNKEEPERS (2).

JOINDER OF COUNTS—See PLEADING (1).

JOINT DEFENDANTS—See PROCESS (2).

JOINT RIGHT TO EASEMENT—See EASEMENTS (11).

JOINT USER—See EASEMENTS (9, 10).

JUDGES—See EQUITY (9, 10); TRIAL (4, 6); WILLS (4).

JUDGMENT.

1. A decree for divorce obtained on substituted service, set aside on affidavit of the defendant and on an order opening his default and permitting him to file an answer, after the filing of which complainant dismissed her bill, is not a valid, subsisting decree for divorce. *Cheyney* v. *Cheyney*, 598.

2. In an action of ejectment to recover the possession of lands which defendants claimed to own by virtue of a deed containing a mistake in the description, a decree previously entered in chancery proceedings, in which defendant's grantor was a complainant and plaintiff was a defendant, involving

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JUDGMENT—Continued.

the same mistake, was not admissible in evidence, where the decree ordered that the bill of complaint, which contained a prayer for the correction of the mistake, be dismissed, without reciting the reasons therefor, or determining the question at issue in ejectment. *Tuthill* v. *Katz*, 618.

3. A judgment is not *res judicata* in a subsequent action involving the same matter where, at the time of the second trial, no judgment has been entered on the prior verdict, and the time for appeal has not elapsed. *Murray* v. *Inner Shoe Tire Co.*, 676.

See APPEAL AND ERROR (16); ATTORNEY AND CLIENT (1); DIVORCE (7); PARTIES (5).

JUDICIAL NOTICE—See INTERNATIONAL LAW.

JURISDICTION — See ACTION; APPEAL AND ERROR (14); CONSTITUTIONAL LAW (10); COSTS (1); CRIMINAL LAW (18, 81); EQUITY (2, 4–8); LARCENY (4); PROCESS (1).

JURY — See CRIMINAL LAW (6, 7, 13–17).

Affidavits of jurors to impeach verdict, see NEW TRIAL (1).

JUSTICES OF THE PEACE.

1. No execution need issue in justice's court, under 1 Comp. Laws, § 845, to entitle a party to a transcript of judgment to the circuit court. *Peck* v. *Cavell*, 16 Mich. 10, distinguished. *Shepard* v. *Schrutt*, 485.

2. The affidavit required by the statute to obtain a transcript is not sufficient alone, unless it states the amount due, and is promptly filed in the office of clerk of the circuit court, with the transcript, in which event no separate affidavit of the amount due (1 Comp. Laws, § 846) need be prepared. *Id.*

3. An affidavit filed in justice's court, made on January 18th, and filed with the transcript of judgment on January 15th in the circuit court, is sufficient, and the delay was not such as to give rise to the presumption of payment after the affidavit was made and before it was filed. *Id.*

4. That the clerk of the circuit court did not take into consideration the amount due, stated in the affidavit, where he properly docketed the transcript and the amounts due, is not an objection to the validity of the transcript, since his act was ministerial and execution properly issued for the correct amount. *Id.*

See COSTS (1); CRIMINAL LAW (18, 22, 23); LARCENY (4).

LABOR LAWS.

Restricting employment of women, see CONSTITUTIONAL LAW (8, 9).

LACHES—See EQUITY (1).

LAND CONTRACTS—See PARTIES (1).

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LARCENY.

1. In a prosecution for larceny of a watch and chain, testimony of the owner that it was worth $42.50 to her, is incompetent to prove its market value. *People* v. *Gilbert*, 511.

2. Where other evidence was introduced to show that the stolen watch was worth $25, and no competent evidence appeared of record that the value was more than $25, respondent was erroneously convicted of a circuit court offense. *Id.*

3. By value is meant, not what the thing is worth to the owner, but the price that it would bring at the time and place of larceny in open market. *Id.*

4. For a conviction at circuit of a crime within the jurisdiction of a justice of the peace, no greater punishment can be imposed than could be imposed by a justice (*People* v. *Harrington*, 75 Mich. 112 [42 N. W. 680]), and where respondent has already served seven months of a sentence, which, at its maximum, should be only three months, the respondent should be discharged. *Id.*

See BURGLARY (3).

LEASES—See REFORMATION OF INSTRUMENTS (1); TRUSTS (1).

LETTERS—See CRIMINAL LAW (25); EVIDENCE (1, 10); FRAUD (8).

LEVY—See EXECUTION (1).

LIBEL AND SLANDER—See CRIMINAL LAW (19).

LICENSE—See ADVERSE POSSESSION (5); INTOXICATING LIQUORS (5, 9–11); MANDAMUS (2); MUNICIPAL CORPORATIONS (2).

LICENSE TO TRANSACT BUSINESS—See CORPORATIONS (7).

LIEN FOR ALIMONY—See EQUITY (5, 8).

LIENS—See ATTORNEY AND CLIENT (1–4); CHATTEL MORTGAGES; EQUITY (2).

LIFE ESTATES—See PERPETUITIES (1, 2); WILLS (14, 17).

LIFE INSURANCE—See INSURANCE (6, 7, 9–16).

LIFE INTERESTS—See WILLS (13).

LIMITED PARTNERSHIP ASSOCIATIONS—See PARTNERSHIP.

LINE FENCE.

Agreement as to, see BOUNDARIES.

LOCAL BUSINESS — See CONSTITUTIONAL LAW (2, 4); CORPORATIONS (7).

LOCAL-OPTION LAW — See CRIMINAL LAW (12, 34); INTOXICATING LIQUORS (1).

LOGS AND LOGGING—See FRAUDS, STATUTE OF (3).

MAIL ORDERS—See CONSTITUTIONAL LAW (3).

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MALICIOUS PROSECUTION.

1. Malicious prosecution lies for the wrongful issuance of an injunction to restrain a defendant from disposing of his personal property, upon averments of a judgment creditor's bill making him a party, praying for an injunction against other defendants, not including him; the issuance of the process being unsupported by the necessary averments in complainant's bill, which failed to show probable cause for the restraining writ. *Krzyszke* v. *Kamin*, 290.

2. A liberal rule should be applied in admitting evidence of damages in such action, and all the facts and circumstances having any tendency to show damages or their probable amount, should, in view of the difficulty of arriving at a result, be placed before the jury. *Id.*

3. It was not error to leave to the jury only the question of damages, where a want of probable cause appeared, and the presumption of malice thereby arose, and the presumption was not rebutted by any evidence. *Id.*

See COSTS (1).

MANDAMUS.

1. The denial of a motion to open the default of defendant, in an action of assumpsit, based on a consideration of the affidavits of plaintiff and defendant, and involving the determination of a question of fact, is an exercise of discretion not reviewable by mandamus for an alleged abuse of discretion. *Boynton* v. *Kent Circuit Judge*, 500, 502.

2. It appearing to the court, on rehearing, that the question of relator's right to a wholesaler's license was litigated in the court below, and that under the opinion of this court he was entitled to such license, mandamus was granted to compel the council to grant it. *Boos* v. *Scudder*, 679.

See CRIMINAL LAW (34); EQUITY (9, 10); HIGHWAYS AND STREETS (8); INTOXICATING LIQUORS (6, 10, 11).

MARKET PRICE—See LARCENY (3).

MARRIAGE—See APPEAL AND ERROR (16).

MASTER AND SERVANT.

1. No liability for failure to furnish a safe place arises between employer and employé where the unsafe condition consisted of holes that had been cut in a dock upon which the servant was employed, and that were not shown to have contributed to his death. *Gehl* v. *Pittsburg Coal Co.*, 285.

2. Failure to warn a servant is not actionable where no evidence tends to show that the servant did not know of the alleged dangers, that he was not warned, or that the negligence caused his injuries. *Id.*

3. An employé who was killed in a place of danger to which he voluntarily went, among moving machinery, in a place not intended for men to work, except when the machinery had been stopped, was guilty of contributory negligence which

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MASTER AND SERVANT—Continued.

precluded plaintiff's recovery for the failure of his employer to cover dangerous cogs, under Act No. 118, Pub. Acts 1901. *Id.* 286.

4. Testimony, in an action for injuries sustained by the breaking of a defective jar holding nitric acid, that defendant made only a visual inspection, that a latent defect existed, which would have been discoverable if defendant had inspected the jar by striking, and that it is necessary to inspect in that way, warranted the submission to the jury of defendant's negligence. *Kretlnich* v. *Detroit Chemical Works*, 462.

5. A miner, engaged in timbering a new shaft in a mine, in preparation for the ordinary operations of the business, may not recover for injuries sustained from the breaking of a staging or scaffolding on which he was at work, on the theory that the master owed him a duty to provide a safe place to work, since that doctrine does not apply while construction work is in progress. *Risku* v. *Iron Cliffs Co.*, 523.

6. In furnishing plank to construct a platform on which the men so engaged could work, the employer owed a positive duty to furnish material of a kind reasonably fit for the purpose which it was intended to serve. *Id.*

7. If planks furnished were of a species of wood which, by its very nature, was unfit for such purpose, having reference to defendant's usual plan of construction, and plaintiff did not know of the unsuitability, he could recover for injuries caused by the breaking of defective material. *Id.*

8. But if the timber was suitable in kind, and sufficient sound material was supplied for the purpose, defendant would not be liable for mistakes or negligence of its employés in selecting it, since they were fellow-servants with plaintiff. *Id.*

9. *Held*, that the evidence of incompetency of plaintiff's fellow-servants was insufficient to raise a question of fact. *Id.*

10. While a miner working at blasting and timbering up a portion of the mine that is in process of construction, may not recover for injuries caused by a fall of ore, resulting from an unusual delay in supporting the roof, on the theory that his master owed a duty to furnish a safe place (*Petaja* v. *Mining Co.*, 106 Mich. 463 [64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505]), he is entitled to such warning and instruction concerning the augmented risk which arises from such a delay, as his inexperience and want of knowledge may, in the exercise of due care, require of the employer. *Hosking* v. *Cleveland Iron Mining Co.*, 538.

11. And defendant is not chargeable with actionable negligence for failing promptly to provide an assistant so that plaintiff might proceed at once to support the earth. *Id.*

12. No negligence is chargeable to defendant for failing to adopt safe methods of work, and see that they were carried out, so as not to subject plaintiff to hazards that were not within his contract of employment. *Id.* 539.

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MASTER AND SERVANT—Continued.

18. Where plaintiff was inexperienced in the kind of work which he was doing, had only worked for defendant about six weeks, and testified that he did not know the danger of a fall of earth would increase by reason of a delay in timbering the raise, such as occurred before his injury, it was error to direct a verdict for defendant, although plaintiff knew that small quantities of ore were likely to fall at any time. *Id.*

14. If plaintiff possessed actual knowledge of the increased risk, or if, in the exercise of ordinary prudence, he should have possessed it, he assumed the risk of his injury. *Id.*

15. The jury should have been instructed to determine, under the testimony: (1) whether or not the delay in timbering increased the danger; (2) whether or not plaintiff knew, or, in the exercise of ordinary prudence, should have known, of the increased danger; (3) whether or not, considering his experience and knowledge, defendant owed him the duty to warn him of the increased danger, if it existed. *Id.*

16. The negligence of a motorman employed by defendant, in starting a car while plaintiff was in the act of boarding it, after his return from noon recess, for the purpose of riding across a street and upon a Y where plaintiff intended to assume charge of the car, in the course of his employment by defendant, was the negligence of a fellow-servant. *Howcroft* v. *Detroit United Ry.*, 608.

17. An employé working in caustic soda, who was injured by some of the chemical flying in his eye and burning it, was entitled to have the question submitted to the jury, whether or not the master should have warned and instructed him concerning the danger of being burned by the soda, where the evidence tended to show that the employé did not know of its dangerous properties and had not been advised by the employer concerning them. *Dascho* v. *Michigan Alkali Co.*, 612.

18. It cannot be said as a matter of law that it is common knowledge that caustic soda is dangerous and will destroy the sight. *Id.*

19. Under testimony tending to show that the injured employé was an ignorant man, that although he had been employed by defendant nearly two months he had not frequently come in contact with caustic soda and did not know it would burn, the question whether or not he assumed the risk was a question of fact. *Id.*

See PRINCIPAL AND AGENT (1).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —See WITNESSES (2, 4, 5).

MEDICAL SERVICES—See CONTRACTS (10, 11).

MICHIGAN RAILROAD COMMISSION—See RAILROADS (1).

MINES AND MINING—See MASTER AND SERVANT (5, 10).

MINORS—See EQUITY (5); PARENT AND CHILD; PARTIES (2, 3).

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MISCONDUCT OF JUROR—See CRIMINAL LAW (6).

MISJOINDER OF PARTIES—See PARTIES (4).

MISTAKE—See DEEDS (1, 2); JUDGMENT (2); REFORMATION OF INSTRUMENTS.

MONOPOLIES—See CONTRACTS (1, 3, 4); CORPORATIONS (2).

MORTGAGES.

1. A deed absolute upon its face may be shown by parol evidence to have been executed as security for a loan from a third party not named in the conveyance; the grantee receiving the title in trust for the real mortgagee. *Olney* v. *Brown*, 125.

2. Where it appeared that a collateral writing was executed by the parties to the deed, reciting the purpose of its execution and stipulating that if the premises conveyed should be sold to satisfy the debt, any balance remaining in the hands of the grantee should be paid to the grantor, or at his option, or in event of his death, to his widow, no trust in the property resulted in favor of the widow after the repayment of the loan by the heirs of the grantor, without a sale of the premises conveyed. *Id.*

3. The complainant, in a suit to determine the amount due on a mortgage held by defendant, has the burden of proving payments which he avers. *Sager* v. *Hartshorn*, 578.

4. *Held* that the weight of the testimony was strongly against complainant's claim that he had made payments which defendant omitted to indorse on the mortgage note. *Id.*

See CHATTEL MORTGAGES; CORPORATIONS (10, 11); CREDITOR'S SUIT; PLEDGES; TRUSTS (2).

MOTIONS — See APPEAL AND ERROR (2, 10, 13, 16, 17); DIVORCE (7, 8); MANDAMUS (1); NEW TRIAL (1); PROCESS (6, 7).

MOTION TO QUASH—See APPEAL AND ERROR (4).

MUNICIPAL CORPORATIONS.

1. Section 2727, 1 Comp. Laws, requiring the president of a village to see that the laws relating to the village and the ordinances and regulations of the council are enforced, confers authority on the president to employ an attorney to prosecute the violation of an ordinance, in the absence of any action of the village council providing for the employment of an attorney. *Hosner* v. *Village of Leonard*, 92.

2. An ordinance of the city of Detroit, forbidding any person from engaging in the business of using vehicles to draw earth and other materials (chapter 54, Compiled Ordinances of Detroit, § 2), without first procuring a license, is authorized by paragraph 186 of the charter of the city of Detroit, regulating the use of vehicles for hire, and does not prohibit a firm, engaged in the business of furnishing building and paving supplies, from delivering its commodities, by its private wagons, without a license; since the ordinance effects a reg-

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MUNICIPAL CORPORATIONS—Continued.

ulation of a business, rather than of the u
the power conferred by paragraph 170 of
of Detroit v. *C. H. Little Co.*, 444.

See HIGHWAYS AND STREETS (1, 2, 4, 7
LIQUORS (5, 7, 10, 12); MANDAMUS (2); PI

MURDER—See CRIMINAL LAW (15).

NEGLIGENCE.

In an action for negligent injuries sustai
caretaker employed by an athletic assoc
stream of water that burst from the c
was forced into a second-story window
deavored to close in order to protect th
being voluntary, in the presence of an o
stituted such contributory negligence as
covery for the alleged negligence of defe
the main. *Taylor* v. *Home Telephone Co*

See CARRIERS (4); DAMAGES (4, 5); FIRE
MASTER AND SERVANT (1–8, 10–12, 15–19);
PRINCIPAL AND AGENT (1); STREET RAIL
(6–8); WITNESSES (1).

NEGOTIABLE INSTRUMENTS—See BILLS AN
TIONS (12).

NEW TRIAL.

1. On motion for a new trial, in a prosecution
of jurors showing that they considered
spondent to take the stand as a witness, i
to impeach the verdict. *People* v. *Stewa*

2. *Held* that the weight of evidence did not
of a new trial. *Id.*

3. The denial of a new trial is *held* to be su
by the weight of the evidence. *Steele* v.

NOTICE—See ADVERSE POSSESSION (4); APPE
ASSIGNMENTS (1, 2); BONDS (3); CHATTEL
DAMAGES (3); INSURANCE (4); MASTER AND S
ING (5).

NOTICE OF DEFENSE—See INSURANCE (7).

NOTICE TO REDEEM—See DEEDS (4).

NUISANCE—See HIGHWAYS AND STREETS (3).

NURSES—See PUBLIC OFFICERS (1, 2).

OBJECTIONS—See APPEAL AND ERROR (9).

OCCUPATION—See INSURANCE (6, 8).

OFFICERS—See APPEAL AND ERROR (11); BA
CORPORATIONS (8); INSURANCE (13); PARTNE

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OIL LEASE—See TRUSTS (1).

OPENING DEFAULT—See JUDGMENT (1).

OPERATION OF STREET CARS—See CARRIERS (4).

OPINION EVIDENCE — See CRIMINAL LAW (1); EVIDENCE (2, 8, 9); FRAUD (5); WILLS (7).

ORAL CONTRACTS—See CONTRACTS (1); SPECIFIC PERFORMANCE (1, 2); TAXATION.

ORDINANCES—See INTOXICATING LIQUORS (7); MUNICIPAL CORPORATIONS; STREET RAILWAYS (1, 2).

ORNAMENTS—See INNKEEPERS (2).

PARENT AND CHILD.

Since it is the duty of a child, if it is able, to support its indigent parent (2 Comp. Laws, §§ 4487, 4490), and of the parent to maintain a minor child, if necessary (2 Comp. Laws, § 4495), a wife, whose husband has deserted her and her minor children, may recover for loss of the services of her minor son, caused by the negligent act of defendant. *Yost* v. *Grand Trunk R. Co.*, 564.

See CONTRACTS (10, 11); ESTATES OF DECEDENTS (1); INSURANCE (10).

PAROL EVIDENCE—See ASSIGNMENTS (1); CARRIERS (3); DEEDS (3); MORTGAGES (1).

PARTIES.

1. The wife who executed jointly with her husband a land contract for the purchase of a fruit farm and who caused to be conveyed in part payment for the premises a parcel which appeared of record to belong to a third party, an attorney of the husband, but to which land the wife had previously had title and in which the plaintiff claimed an equity, is a necessary party to an action for fraud of the vendor in making the sale, where only a small part of the agreed price had been paid, and plaintiff did not attempt to rescind his bargain. *Lang* v. *Prindle*, 256.

2. An action brought by a plaintiff, described as guardian of certain minors, may, under the statute of amendments, be treated on error as brought by plaintiff in his capacity of guardian, where the cause of action was for an injury to an automobile of the wards, in the possession of plaintiff, their general guardian, and where the objection was raised not by plea in abatement but by a motion to direct a verdict at the close of plaintiff's evidence. 3 Comp. Laws, § 10268 *et seq.* *Newton* v. *Detroit United Ry.*, 373.

3. The guardian was not an improper party plaintiff. *Id.*

4. The claim that complainants having similar rights are improperly joined in a suit to restrain defendants from using a right of way over complainants' lands, is waived by the filing of a

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PARTIES—Continued.

cross-bill in which defendants pray for relief against both complainants. *Bean* v. *Bean*, 379.

5. A decree in a suit to enjoin a trespass wherein defendants claim a right of way by prescription and ask affirmative relief by cross-bill, cannot affect rights of an adjoining proprietor who is not a party.. *Id.*

See CONTRACTS (9); INSURANCE (11); PLEADING (1); WITNESSES (1).

PARTITION.

Partition will not be granted to a beneficiary under a trust instrument, where the purpose of the trust would be defeated or impaired by a division of the property. *Ward* v. *Ward*, 570.

See EQUITY (6); TRUSTS (5); WILLS (18).

PARTNERSHIP.

1. An oral contract made by the manager of a limited partnership association to hire plaintiff for a year at an annual salary of $2,000, is void under 2 Comp. Laws, § 6083, providing that no liability exceeding $500 shall be binding on the association unless reduced to writing and signed by at least two managers. *Beach* v. *Business Man's Publishing Co.*, 226.

2. And the contract is not valid by estoppel where the association was engaged in business other than the buying and selling of merchandise, and the contract did not relate to the purchase or sale of the same. *Id.*

3. The general manager of an association engaged in buying and selling merchandise may not be authorized to create a liability of over $500 against the association for other purposes than buying and selling merchandise. *Rhoades* v. *Pure Food Co.*, 149 Mich. 235 (112 N. W. 940). *Id.*

PART PAYMENT—See FRAUDS, STATUTE OF (1).

PAYMENT—See APPEAL AND ERROR (1); ASSIGNMENTS; FRAUDS, STATUTE OF; MORTGAGES (3, 4).

PEDDLERS—See PLEADING (5).

PENALTIES—See CONSTITUTIONAL LAW (7).

PERMISSIVE USER—See ADVERSE POSSESSION (5, 7).

PERPETUITIES.

1. A will creating a life estate in the testator's widow, a life estate in his daughter after the widow's death, title to vest in a granddaughter, if living at the termination of the life estates; if not, title to vest in his surviving grandchildren, does not violate the statute (3 Comp. Laws, §§ 8796, 8797), which prohibits the suspension of the absolute power of alienation for a longer period than two lives in being at the creation of the estate. *McInerny* v. *Haase*, 364.

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PERPETUITIES—Continued.

2. The period of suspension is not determined by the fact that more than two lives were in being when the estate was created, who, by a contingency, might share in its distribution, but by the number of life estates between the creation of the estate and its enjoyment in possession. *Id.*

3. The devise created a vested remainder in the granddaughter, subject to be divested in the event of her death during the life of the mother. *Id.*

PERSONAL ACTIONS—See ABATEMENT AND REVIVAL (2).

PERSONAL INJURIES—See ACTION; CARRIERS (4); MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS (1); TRIAL (8, 7, 8).

PERSONAL LIBERTY—See CONSTITUTIONAL LAW (8).

PERSONAL PROPERTY—See FRAUDS, STATUTE OF (1); WILLS (18).

PHYSICIANS AND SURGEONS—See CONTRACTS (10).

PLEADING.

1. The filing of a plea to a declaration for fraud waives the objection that certain counts alleged fraud against one defendant and other counts against two defendants. *Diel* v. *Kellogg*, 162.

2. An election should be required on defendant's motion to determine on which counts plaintiff would proceed. *Id.*

3. Error in failing to require such election was cured by plaintiff's dismissal, at the close of his testimony, of his case against one of the defendants, no bad faith being apparent. *Id.*

4. Nor was the admission of testimony concerning representations made by the defendant as to whom the action was dismissed, prejudicial to the other defendant, in view of the charge of the court which withdrew that evidence from the consideration of the jury. *Id.*

5. The defense that a contract was in violation of the statute (2 Comp. Laws, § 5824) prohibiting the sale of goods by peddlers without a license, must be pleaded by a special notice under the general issue. *Despres, Bridges & Noel* v. *Zierleyn*, 400.

See BONDS (2, 3); CORPORATIONS (5, 6); DIVORCE (5); EASEMENTS (6); INSURANCE (7, 8); MALICIOUS PROSECUTION (1); PARTIES (4); TRUSTS (4).

PLEA OF GUILTY—See CRIMINAL LAW (31).

PLEDGES.

Where a corporation assigned its interest in pledged bonds to another creditor as security for its debt, and such creditor purchased the bonds of the pledgee on default at public sale, it became the owner of both liens, entitled to collect interest on the bonds from the time the interest had been

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PLEDGES—Continued.

paid on the debt secured thereby, not being limited to interest from the date of purchase. *Union Trust Co.* v. *Electric Park Amusement Co.*, 688.

See CORPORATIONS (10-12).

POLICE POWERS — See CONSTITUTIONAL LAW (8); MUNICIPAL CORPORATIONS (1).

POSSESSION OF STOLEN GOODS—See BURGLARY.

POWER TO SECURE LOANS—See CORPORATIONS (10).

PRACTICE—See APPEAL AND ERROR (3, 5, 9, 11, 18); BONDS (2); CRIMINAL LAW (30); EQUITY (3, 9); INSURANCE (8); JUSTICES OF THE PEACE (3); PARTIES (2); PROCESS (6, 7).

PREFERRED CREDITORS—See RECEIVERS (3).

PREJUDICE—See INSURANCE (5).

PRESCRIPTION—See ADVERSE POSSESSION (3, 5); PARTIES (5).

PRESUMPTION OF INNOCENCE—See CRIMINAL LAW (29).

PRESUMPTIONS — See ADVERSE POSSESSION (4); DIVORCE (2); EQUITY (6); INSURANCE (3); JUSTICES OF THE PEACE (3); MALICIOUS PROSECUTION (3); WILLS (2, 3).

PRINCIPAL AND AGENT.

1. Sectionmen of a railroad company, who set fires in the course of their employment, in violation of the orders of the employer, and negligently permit fire to escape onto premises of another, render the company liable for their act. *Lefjonier* v. *Detroit, etc., R. Co.*, 635.

2. An agent cannot bind his principal in a contract which the agent makes with himself; and the doctrine extends to public officers. *Baars* v. *Township of Laketon*, 665.

See CARRIERS (1, 2); INSURANCE (13); WILLS (1, 2); WITNESSES (3, 5).

Authority of bank cashier, see BANKS AND BANKING.

PRINCIPAL AND SURETY—See BONDS (1, 4); PROCESS (1).

PRIORITY—See INTOXICATING LIQUORS (6).

PRIVILEGED COMMUNICATIONS—See CRIMINAL LAW (25, 26).

PROBABLE CAUSE—See MALICIOUS PROSECUTION (1).

PROBATE APPEALS—See ESTATES OF DECEDENTS (9); WILLS (1).

PROCESS.

1. An action of assumpsit against a foreign corporation, as surety upon the bond of a receiver, may be instituted in the county of plaintiff's residence, and service obtained in another county in which an agent for service of process, appointed under 2

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PROCESS—Continued.

Comp. Laws, § 5198, resides. *People, for use of Wipfler,* v. *Fidelity & Deposit Co. of Maryland,* 94.

2. The validity of service of such process is not affected by the joinder in the action of another defendant upon whom no service of process is obtained. *Id.* 95.

3. Act No. 321, Pub. Acts 1907, does not change the effect of the statute requiring such appointment, since the amendment refers only to bonds of liquor dealers. *Id.*

4. 2 Comp. Laws, § 5198, is sufficiently entitled to indicate the purpose of the statute, which is not to change the jurisdiction of the courts, but to impose conditions upon foreign surety companies doing business in Michigan. *Id.*

5. Such corporation may consent to the acceptance of service in a State where it is transacting business, and in which it is not a resident or citizen. *Id.*

6. Disputed questions of fact are not triable on motion and affidavits as to the sufficiency of service of process. *Daniels* v. *Detroit, etc., R. Co.,* 468.

7. But where no question of fact is raised, the court will dispose of a motion to quash service of process, for the alleged reason, that defendant, a foreign corporation, was improperly served. *Id.*

8. Before the enactment of Act No. 3, Pub. Acts 1909, an action against a nonresident corporation might be commenced by attachment and seizure of property, under 3 Comp. Laws, § 10011. *Id.*

See CONSTITUTIONAL LAW (10); CORPORATIONS (9); EXECUTION (2); JUDGMENT (1).

PROHIBITION—See INTOXICATING LIQUORS (7, 9).

PROMOTERS—See FRAUD (1, 2, 8, 10).

PROOF OF DEATH—See INSURANCE (7).

PROOFS OF LOSS—See INSURANCE (2).

PROPRIETARY MEDICINES—See CONTRACTS (1).

PROSECUTING ATTORNEY—See CRIMINAL LAW (10, 18, 28); TRIAL (1).

PROXIMATE CAUSE—See MASTER AND SERVANT (1).

PUBLIC OFFICERS.

1. A member of the board of registration of nurses, under Act No. 319, Pub. Acts 1909, must have five years' experience as a professional nurse, which qualification is not met by experience gained at intervals before her graduation as a trained nurse while engaged in teaching school. *People, ex rel. Attorney General,* v. *Galbraith,* 47.

2. The statute having prescribed the qualifications necessary to

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PUBLIC OFFICERS—Continued.

authorize an appointment, the governor is limited to the appointment of persons possessing them, and the appointment of an ineligible person is a nullity. *Id.*

8. After the resignation of a member of the board of village trustees, and the holding of a special election to elect a successor, the council of the village determined the result of the election, declaring the respondent elected. A motion was carried permitting the candidate to qualify at once and to take office. *Held* that although, under 1 Comp. Laws, § 2711, the special election was invalid, and the vacancy should have been filled by appointment, the action of the village council complied with the statutory requirement and that quo warranto would not lie to oust respondent and vacate the office. *People, ex rel. Sutherland,* v. *Ford,* 359.

4. A highway commissioner cannot recover for services rendered in overseeing the work of his own man and team upon the highway; a contract with himself for such work being unlawful. *Baars* v. *Township of Laketon,* 665.

See APPEAL AND ERROR (13); HIGHWAYS AND STREETS (8); MUNICIPAL CORPORATIONS (1); PRINCIPAL AND AGENT (2).

PUBLIC POLICY — See BILLS AND NOTES; CONTRACTS (3); DIVORCE (3, 6).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (1).

QUIETING TITLE — See ABATEMENT AND REVIVAL (4); EASEMENTS (12).

QUO WARRANTO—See PUBLIC OFFICERS (3).

RAILROADS.

1. Rules promulgated by the Michigan Railroad Commission, establishing and enforcing demurrage rates, must be limited to commerce within the State, since section 8 of Act No. 300, Pub. Acts 1909, limits the authority of the commission to the regulation of transportation within the State of Michigan. *Ann Arbor R. Co.* v. *Michigan Railroad Com'n,* 49.

2. Where the use of a right of way was derived by a railroad company by deed, conferring the joint right to use an easement on a portion of complainant's premises, its right depended on the conveyance, not on its franchise from the municipality to use streets and other ways, and the validity of the franchise and ordinance is not subject to complainant's objection. *Hanselman* v. *Grand Trunk Western R. Co.,* 496.

See CARRIERS (1-3); CORPORATIONS (9); EASEMENTS (7, 8, 10, 11); EMINENT DOMAIN; FIRES; HIGHWAYS AND STREETS (1, 4, 6); PARENT AND CHILD; PRINCIPAL AND AGENT (1).

RATIFICATION—See PARTNERSHIP (2).

REAL PROPERTY—See ABATEMENT AND REVIVAL (3); ADVERSE POSSESSION; BOUNDARIES; EASEMENTS; EQUITY (1, 3); ESTATES

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REAL PROPERTY—Continued.
OF DECEDENTS (2, 4); MORTGAGES (2); PERPETUITIES; REFORMATION OF INSTRUMENTS (8); SPECIFIC PERFORMANCE; TAXATION; WILLS (14).

REASONABLE DOUBT—See CRIMINAL LAW (29).

REASONABLE TIME—See INSURANCE (15, 16).

REASONABLE USE—See EASEMENTS (10).

RECEIPT—See EXECUTION (2).

RECEIVERS.

1. In proceedings for the dissolution of a corporation, for which a receiver has been appointed, the circuit court in which the proceedings are pending may exercise its discretion in permitting, or in refusing to permit, the receiver to employ the fund in litigation at the request of some creditors, and against the objection of others. *Standart Bros.* v. *Ingham Circuit Judge*, 106.

2. Such discretion may be affected by the apparent hazard of the litigation. *Id.*

3. It is inequitable to impose a condition that the interested creditors shall give security for the costs and expenses of the proceeding without giving them the right to be first paid from the fund which may result from the litigation. *Id.*

See ATTORNEY AND CLIENT (4).

RECORD—See APPEAL AND ERROR (10); CHATTEL MORTGAGES (2); INSURANCE (3).

REDEMPTION—See TAXATION.

REDUCING CLAIM TO JUDGMENT—See ATTORNEY AND CLIENT (2).

REFORMATION OF INSTRUMENTS.

1. Under conflicting testimony, in a suit to reform a lease and to correct a mutual mistake, the opinion and decree of the lower court that the evidence failed to disclose a mutual mistake with such a degree of certainty as to justify reformation, is sustained. *Pastorino* v. *Palmer*, 265.

2. While a deed may be reformed when it is satisfactorily proven that a mutual mistake has been made, such fact must be clearly made to appear. *Dillie* v. *Longwell*, 439.

3. And evidence of the grantee that a parcel was to be included in the deed, contradicted by the grantor, and not satisfactorily supported by other proofs, is insufficient to warrant a decree reforming the instrument so as to include the omitted parcel, on the ground of mistake. *Id.*

RELATIVES—See WILLS (8, 9).

RELIANCE ON REPRESENTATIONS—See FRAUD (6).

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RELIGIOUS BELIEF—See TRIAL (6).

REMAINDERS.

Remainders are vested when there is
would have an immediate right to po
of the intermediate or precedent es
the person to whom or the event upon
remains uncertain. 3 Comp. Laws,
Haase, 365.

See PERPETUITIES.

REMAND—See APPEAL AND ERROR (2).

REMEDIES — See CONSTITUTIONAL LAW
STATUTES (1).

REPEALS BY IMPLICATION—See STATU

REPRESENTATIONS OF THIRD PERSOI

REQUESTS TO CHARGE—See CRIMINAL

REQUIREMENTS—See FRAUDS, STATUTE (

RESCISSION—See CONTRACTS (5, 8).

RES GESTÆ—See ASSAULT AND BATTERY

RES JUDICATA—See JUDGMENT (2, 3).

RESTRAINT OF TRADE—See CONTRACTS

RESTRICTION ON TRANSFER—See CORI

RETAIL—See INTOXICATING LIQUORS (9).

RETROACTIVE LAW—See HIGHWAYS AN

RETURN TO WRIT—See APPEAL AND ER

RIGHT OF ACCESS—See HIGHWAYS AND

RIGHT OF WAY—See ADVERSE POSSESSI
(1, 3–8).

SAFE PLACE—See MASTER AND SERVANT

SALES.

1. The contentions of defendants, in a
rags sold, that the evidence conclusi
contemplated that defendants shou
also that the defendants' weights w
correct according to the government
ported by the evidence. *Sachse* v. *H*

2. Although goods were not weighed b
weights, the question of the true v
cerning which the evidence of the p
spective scales, was conflicting, was

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SALES—Continued.

3. Evidence of defendants, in an action for the purchase price of an elevator and electric motor, that frequent repairs were required, that the motor was old and often failed to work, that the parts were worn, and that its insulation was imperfect, presented a sufficient showing to raise an issue of fact as to the breach of a warranty of material and workmanship. *H. J. Reedy Co.* v. *Cameron*, 638.

See BONDS (4); CONTRACTS (5); CORPORATIONS (1); EVIDENCE (7); FRAUDS, STATUTE OF.

SALOONS—See INTOXICATING LIQUORS (5, 8, 9, 11).

SAVING QUESTIONS FOR REVIEW — See APPEAL AND ERROR (3, 6, 15, 18); CRIMINAL LAW (29, 30).

SCAFFOLDING—See MASTER AND SERVANT (5, 6).

SEALED VERDICTS—See CRIMINAL LAW (13, 14, 16, 17).

SECURITY FOR COSTS—See RECEIVERS (3).

SENTENCE—See CRIMINAL LAW (22); LARCENY (4).

SEPARATE MAINTENANCE—See DIVORCE (5–7).

SEPARATION OF GRADES—See GRADES, SEPARATION OF.

SEPARATION OF JURY—See CRIMINAL LAW (15–17).

SERVICES, LOSS OF—See PARENT AND CHILD.

SERVITUDES—See EASEMENTS (2–4).

SET-OFF AND RECOUPMENT—See EVIDENCE (7).

SHAME AND MORTIFICATION—See INTOXICATING LIQUORS (3).

SHERIFF—See EXECUTION.

SIGNATURE—See BONDS (1).

SITUS OF PROPERTY—See EQUITY (2).

SPECIAL ASSESSMENT—See APPEAL AND ERROR (1).

SPECIAL DAMAGES—See DAMAGES (3).

SPECIFIC PERFORMANCE.

1. Under a bill of complaint for specific performance, averring and supported by proof that complainant entered into an oral agreement to care for her father and live with him, in consideration that he transfer to her at his death the premises on which the parties resided; that he conveyed the premises to the other defendants, in breach of said contract, which was known to them; that they commenced summary proceedings against complainant to recover possession of the property and obtained a judgment of ouster; that complainant was precluded from setting up her equitable defense in the action at law; praying that an injunction issue restrain-

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SPECIFIC PERFORMANCE—Continued.

ing the enforcement of the judgment, and for general relief, the court should not dismiss the suit at the close of complainant's testimony which was *prima facie* sufficient to entitle her to some form of relief; and the cause, on appeal, should be remanded to permit the defendants to present their proofs. *Hulan* v. *Shannon*, 310.

2. The decree of the circuit court granting specific performance of a contract, not in writing, to convey real property, is sustained as warranted by sufficient although conflicting evidence. *Brown* v. *Brown*, 337.

See CONTRACTS (9); EQUITY (3); TAXATION.

STANDARD WEIGHTS—See SALES (2).

STARTING CAR—See CARRIERS (4).

STATUTE OF AMENDMENTS—See PARTIES (2).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See ADVERSE POSSESSION (3).

STATUTES.

1. Act No. 3, Pub. Acts 1909, merely broadens a remedy and in no way affects the cause of action. *Daniels* v. *Detroit, etc., R. Co.*, 468.

2. Repeals by implication not being favored, acts which are not irreconcilable should be allowed to stand. *Boos* v. *Scudder*, 679.

See ABATEMENT AND REVIVAL (1, 3); APPEAL AND ERROR (5, 14); CHATTEL MORTGAGES (2); CONSTITUTIONAL LAW (3, 5, 11); CONTRACTS (4); CORPORATIONS (1, 4, 7); COSTS; CRIMINAL LAW (15, 18, 25, 30, 32); DAMAGES (4); EQUITY (4, 5); ESTATES OF DECEDENTS (3, 9); EXECUTION; HIGHWAYS AND STREETS (1, 4, 6, 8); INNKEEPERS; INTOXICATING LIQUORS (1, 5, 8, 12); MASTER AND SERVANT (3); PARTNERSHIP (1, 3); PERPETUITIES (1); PLEADING (5); PROCESS (3, 4, 8); PUBLIC OFFICERS (1-3); RAILROADS (1); REMAINDERS; TELEGRAPHS AND TELEPHONES; TRUSTS (5); WITNESSES (2-5).

STATUTES, REPEAL OF—See CONSTITUTIONAL LAW (6).

STATUTORY DAMAGES—See EASEMENTS (11).

STATUTORY PENALTIES—See TELEGRAPHS AND TELEPHONES.

STOCK AND STOCKHOLDERS—See CORPORATIONS (1); DAMAGES (1); EVIDENCE (2); FRAUD (1, 5, 11).

STREET RAILWAYS.

1. Knowledge of a person injured at a street railway intersection, that cars were required by ordinance and were accustomed to stop before crossing the intersection, and his reliance on the fact, have a material bearing on the question of contributory negligence in driving a hose cart across in front of the

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STREET RAILWAYS—Continued.

car, which he saw approaching some distance from the street intersection. *Theisen* v. *Detroit United Ry.*, 68.

2. Such reliance on the ordinance and custom, where the city charter also gave the fire apparatus the right of way over other vehicles, made the question of contributory negligence a question of fact. *Id.*

3. If the driver had his horses under control and attempted to cross in front of a car which he saw from 40 to 70 feet away from the usual stopping place, it was for the jury to say whether he was justified in relying on the motorman's performance of his duty to stop the car. *Id.*

See CARRIERS (4); MASTER AND SERVANT (16).

SUBSCRIPTION TO CORPORATE STOCK—See FRAUD (1, 2, 8).

SUBSEQUENT OFFER OF PERFORMANCE—See CONTRACTS (7).

SUBSEQUENT STATEMENTS—See FRAUD (9).

SUBSTITUTION OF COUNSEL — See ATTORNEY AND CLIENT (3, 4).

SUPPLEMENTAL DECREE—See EQUITY (9, 10).

SUPPORT OF CHILDREN—See EQUITY (8).

SUPPORT OF FAMILY—See DAMAGES (5).

SUPPORT OF PARENT—See CONTRACTS (10, 11).

SUPREME COURT—See APPEAL AND ERROR (1, 3, 14).

SURVEYS—See BOUNDARIES (3).

SURVIVAL OF ACTIONS—See ABATEMENT AND REVIVAL (1, 2); DAMAGES (4).

TAXATION.

In consideration that a corporation should locate and construct a mill on certain property, complainant's father orally agreed to deed to the concern a lot owned by him. The mill was constructed, and a shop used in connection with the business was built on the lot, of which no deed was made by the owner to said corporation. Subsequently it purchased a tax interest for taxes of 1888 on the property and gave notice to complainant and other heirs of the father to redeem. On a bill against purchasers of the corporate business and assets to enforce the right of redemption, *held* that a decree should be entered for defendants, as prayed, dismissing the bill, since the court would, if all the persons in interest were before it, require the specific enforcement of the agreement to convey. *Cowley* v. *McGregor*, 517.

See APPEAL AND ERROR (1); DEEDS (4); EASEMENTS (12, 13, 15).

Duty to pay taxes, see EASEMENTS (15).

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TAX PURCHASE—See DEEDS (4).

TELEGRAPHS AND TELEPHONES.

Plaintiff was a stockholder of a local telephone company which had a contract with defendant to render to its subscribers telephone service with independent telephone systems in the county. Plaintiff's brother was a member of an unincorporated independent association, in the same county, which had entered into a contract with defendant to connect its lines with the switch board of defendant. Under the agreement the independent association contracted to pay all transfer charges and messenger fees incurred by its members, and an annual fee, to the defendant; amounts so incurred to be a charge upon the individual member of the association who incurred the charge. Although defendant's contract with plaintiff's company provided that service might be refused to delinquent subscribers, no such provision appeared in the contract with the independent association. Defendant, on numerous occasions, refused plaintiff connections with the telephone of his brother, a member of the voluntary association, alleging as a reason for its refusal, that the brother was in arrears for certain charges. Plaintiff brought assumpsit to recover the penalties imposed under 2 Comp. Laws, § 5270, for refusing to render the service. *Held*, that, under the contract of the voluntary association, of which the delinquent was a member, the association was primarily liable for the fees, and defendant was bound to furnish connection with his telephone at plaintiff's request. *Osborne* v. *Reading Central Telephone Co.*, 545.

TESTAMENTARY TRUST—See WILLS (18).

TICKET AGENT—See CARRIERS (1, 2); EVIDENCE (6).

TICKETS—See CARRIERS (3).

TIME—See APPEAL AND ERROR (13, 14); EXECUTION (2); JUSTICES OF THE PEACE (3).

TIME-TABLES—See EVIDENCE (6).

TITLE—See CHATTEL MORTGAGES (1); INSURANCE (1, 3, 4).

TITLE OF ACT—See PROCESS (4).

TOWNSHIPS—See PUBLIC OFFICERS (4).

TRADE-NAMES—See CONTRACTS (2).

TRANSCRIPTS OF JUDGMENT—See JUSTICES OF THE PEACE.

TRANSITORY ACTIONS—See EQUITY (2).

TRANSPORTATION—See CARRIERS.

TRESPASS—See PARTIES (5).

TRIAL.

1. While it was reprehensible for the prosecuting attorney to

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TRIAL—Continued.

state, in his argument, that it is common knowledge that people burn buildings for insurance, no prejudice can be held to have resulted, in view of the fact that the court instructed the jury to ignore the statement. HOOKER and MOORE, JJ., dissenting from the conclusion that the argument was improper. *People* v. *Stewart*, 1.

2. Remarks of counsel in argument directed at defendant's counsel personally, and of an uncourteous nature, cannot be held to have influenced the verdict. *Goodwin* v. *Union Ins. Co. of Philadelphia*, 42.

3. In an action by a passenger against a carrier for personal injuries, in which the jury awarded a large verdict and the principal issue related to the extent of plaintiff's injuries, it was error for the trial court to indicate, by remarks, in the presence of the jury, that he had observed that plaintiff was in such pain while on the stand that he had been on the point of intervening two or three times to have something done for plaintiff's comfort. *Marshall* v. *Wabash R. Co.*, 88.

4. Remarks of the trial judge to the attorneys and expressions in the charge of the court showing bias or prejudice constitute reversible error. *Schwanz* v. *Wujek*, 493.

5. It is not an improper exercise of discretion for the trial court to refuse plaintiff permission to withdraw a juror, on the ground alleged by plaintiff's attorney, of the absence of a witness, for which no sufficient excuse is offered. *Howcroft* v. *Detroit United Ry.*, 608.

6. Prejudicial error is committed in a trial of a negligence case by the trial judge remarking in the presence of the jury that plaintiff's views relative to faith healing were not religion and too "fakey," and such remarks constituted improper comment on plaintiff's religious opinions. *Jageriskey* v. *Detroit United Ry.*, 631.

7. It is the duty of the trial court to instruct the jury concerning the measure of damages in an action against a street railway company for negligent injuries to a passenger; and the requirement is not met by a charge that the damages were entirely for the determination of the jury. *Id.*

8. Plaintiff was entitled to have a requested instruction given, that the amount of damages must be such sum as would make her whole or compensate her for such injuries as they might find she had suffered, or would suffer in the future, as a result of defendant's negligence. *Id.*

9. It was not improper conduct of the trial court, upon cross-examination of a witness, after an objection made by counsel, and, on referring back to a previous question and answer, to say, "Of course, he denied it," when it is apparent that the court merely asked for information and referred to the effect of the question and answer. *Weaver* v. *Murray*, 660.

See COMPROMISE AND SETTLEMENT; CRIMINAL LAW (1, 6, 8, 10, 18, 21, 27, 33); ESTATES OF DECEDENTS (6, 9); INSURANCE (5); PLEADING (2–4); WILLS (4).

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TRIAL BY COURT—See APPEAL AND ERROR (15, 18).

TRIAL BY JURY—See CRIMINAL LAW (12).

TRUSTS.

1. Complainant subscribed the sum of $1,000 towards the purchase of a lease covering certain oil lands and a completed well, and this sum and all other subscriptions were placed in the hands of one of the defendants, a subscriber to the enterprise, under a trust agreement. The payments to the trustee amounted to $12,500, of which he expended only $3,500 in purchasing the lease, retaining the remainder of the funds in his hands and claiming to have expended the entire amount. He, in fact, owned a two-thirds interest in the lease, a circumstance which he concealed from the other promoters. On a bill filed to compel an accounting, *held* that the trustee must be charged with his own subscription to the fund and must account for the entire amount remaining in his hands above the purchase price of the lease. *Mast* v. *Purchase*, 35.

2. Evidence considered and *held* to warrant a decree for defendant, upon a bill in equity to subject a loan made in decedent's name to a trust in favor of complainant, who claimed to have advanced the money. *Brown* v. *Brown*, 341.

3. Under provisions of a will which creates a trust for a period of twelve years after testator's death, or until the death after his decease of two children within six years, with powers to the trustees to sell, lease, convey, or mortgage the property, or to terminate the trust after six years from his death, the trust does not terminate of itself while all the heirs are living, after six years from testator's death. *Ward* v. *Ward*, 570.

4. By admitting in his bill of complaint and brief that the trust was valid, complainant estopped himself from questioning its validity. *Id.* 571.

5. Nor has 3 Comp. Laws, § 11015, permitting any person except a remainderman having an estate in possession of lands, to bring partition, abrogated the rule that relief will be denied where it will defeat the purpose of such trust. *Id.*

See CONTRACTS (3, 4); EASEMENTS (12); EQUITY (1); ESTATES OF DECEDENTS (6–9); INSURANCE (11); MORTGAGES (1, 2); PARTITION; WILLS (18).

UNDUE INFLUENCE—See WILLS (1–3, 6, 11, 12).

USE—See ESTATES OF DECEDENTS (7); WILLS (13); WORDS AND PHRASES.

USE IN COMMON—See EASEMENTS (7).

USER—See ADVERSE POSSESSION (7); EASEMENTS (8–10); RAILROADS (2).

USUFRUCT—See ESTATES OF DECEDENTS (7).

VALIDITY OF MEETINGS—See CORPORATIONS (12).

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VALUE—See DAMAGES (6); EVIDENCE (2); FRAUD (5).

VARIANCE—See APPEAL AND ERROR (6); ARSON.

VEHICLES.

Regulation of, see MUNICIPAL CORPORATIONS (2).

VENDOR AND PURCHASER—See PARTIES (1).

VENUE—See EQUITY (2); PROCESS (1).

VERDICT — See CRIMINAL LAW (13-16); INSURANCE (5); NEW TRIAL (1).

VESTED REMAINDERS—See PERPETUITIES (3); REMAINDERS.

VILLAGES—See INTOXICATING LIQUORS (5-7, 9, 10, 12); MANDAMUS (2); MUNICIPAL CORPORATIONS (1); PUBLIC OFFICERS (3).

VOID CONTRACTS—See CONSTITUTIONAL LAW (7).

VOLENTI NON FIT INJURIA—See NEGLIGENCE (1).

VOLUNTARY GRANT—See EASEMENTS (2).

WAIVER — See APPEAL AND ERROR (9, 16, 17); CRIMINAL LAW (31); EASEMENTS (11); INSURANCE (13, 14); PARTIES (4); PLEADING (1).

WAIVER OF TORT—See ELECTION OF REMEDIES (2).

WARNER-CRAMTON ACT—See INTOXICATING LIQUORS (12).

WARNING AND INSTRUCTING SERVANT — See MASTER AND SERVANT (2, 10, 13-15, 17).

WARRANT—See CRIMINAL LAW (31).

WARRANTY—See CONTRACTS (6); INSURANCE (6); SALES (3).

WATCH AND CHAIN—See INNKEEPERS (2); LARCENY (1, 2).

WATERCRAFT PROCEEDINGS—See APPEAL AND ERROR (9).

WAYNE COUNTY—See EQUITY (9, 10).

WAY OF NECESSITY—See EASEMENTS (1, 2, 5).

WEIGHT OF EVIDENCE—See INSURANCE (1); NEW TRIAL (2, 3).

WEIGHTS AND MEASURES—See SALES (1, 2).

WHOLESALE—See INTOXICATING LIQUORS (7-9); MANDAMUS (2).

WILLS.

1. On the trial, on appeal, of the question of the valid execution of a will, by which the testatrix gave to her confidential agent a large bequest and the residuary portion of her estate, assigning a reason therefor which was not correct, it was not error to submit to the jury the questions of undue influence and of mental incompetency, under evidence tend-

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WILLS—Continued.

ing to show that he recommended to her a person to draft the instrument, procured the preparation of the will, was present when it was executed and acted as its custodian until her decease, and that the testatrix was about 80 years of age at the date of its execution. *In re McMaster's Estate*, 211.

2. It was error to charge the jury that the rule prevailing in ordinary cases, casting the burden of proof of undue influence on contestants, was here reversed and that the presumption of fact arising from the confidential relation borne by the proponent and from the legacy bequeathed to him, required him to show to the satisfaction of the jury that any connection he may have had with the execution of the will was fair and honest. *Id.*

3. Such presumption is one of fact, the force and effect of which is for the jury and which depends in every case upon all the circumstances. *Id.*

4. It was improper for the trial judge to intimate an opinion in his instructions to the jury that the circumstances presented strong evidence of undue influence. *Id.*

5. Statements of proponent who was charged with employing undue influence as to matters relating to the execution of the will, made subsequently to the decease of testatrix and conflicting with his testimony on the stand, were competent to impeach him and to support the presumption of undue influence that arose from his relations with the testatrix. *Id.*

6. A request was properly denied which asked the court to charge the jury that the provisions of the will had no tendency to prove undue influence or fraud, standing alone, where it was impossible to dissociate the instrument from surrounding circumstances tending to show undue influence. *Id.* 212.

7. The opinions of witnesses as to the mental incompetency of the testatrix, based on ordinary knowledge and observation, should not have been received in evidence unsupported by sufficient testimony of observed facts and conditions on which the opinion was based. *Id.*

8. Error was committed in receiving evidence of the financial condition and state of health of deceased's cousins who had no claim upon her bounty. *Id.*

9. In view of an attempt to show that the testatrix had demonstrated affection towards a nephew, the exclusion of evidence of reasons known to her for making no other provision for her nephews was improper. *Id.*

10. A statement of the nephew that he purposed studying hypnotism to hypnotize her and get her to make a will in his favor, was not competent in the absence of evidence that she knew of his purpose, or that he attempted to execute it. *Id.*

11. Contestants were entitled to subject the proponent to a searching cross-examination, and to ask if he knew of any reason why she made him a legatee. *Id.*

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WILLS—Continued.

12. A conversation which, standing alone, might not tend to show undue influence, was a proper subject of consideration by the jury with other evidence having such tendency. *Id.*

13. A bequest to the wife of testator of his personal property, except notes, mortgages, bonds and similar valuables, of which only the use and interest during her life was granted, the same to be equally divided after her death among his brothers and sisters, operates as a gift of the other property absolutely, and transfers a life interest in the excepted securities. *In re Moor's Estate*, 353.

14. A devise of testator's real property to his widow, under like restrictions, conveys a life estate, notwithstanding a subsequent provision in the instrument that, although she should have the right to dispose of the real estate, the testator expected her to carefully and prudently save and invest the proceeds realized from the sales thereof, for the benefit of the other devisees. *Id.*

15. Her failure to comply with such requirement would charge her estate with liability for the proceeds of sales of the realty. *Id.* 354.

16. Where the language of a will is plain and unambiguous, the intention of the testator must be gathered from its terms and is not to be determined from alleged declarations made by testator after its execution, or from the subsequent condition of the parties in interest. *Id.*

17. A life estate expressly created will not be converted into a fee absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive. *Jones* v. *Jones*, 25 Mich. 401, distinguished. *Id.*

18. A will creating a trust estate in a portion of testator's property for the benefit of his heirs, for a period of twelve years after his decease, or until the death of two of his children, giving authority to the trustees to terminate the trust after six years, and to convey and control the trust estate, dividing such sums among the heirs annually as can be so divided with regard to the successful conduct of the trust, and containing provisions for the due distribution of the estate at the termination of the trust, is sufficiently definite and complete to be valid, and creates an estate that is inconsistent with partition at the end of six years. *Ward* v. *Ward*, 570.

See ESTATES OF DECEDENTS (6, 8); PERPETUITIES (1–3); TRUSTS (3); WITNESSES (4); WORDS AND PHRASES.

WITHDRAWAL OF JUROR—See TRIAL (5).

WITNESS, ABSENCE OF—See TRIAL (5).

WITNESSES.

1. The latitude to be given in cross-examining the plaintiff is within the discretion of the trial court. *Cummings* v. *Detroit United Ry.*, 304.

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WITNESSES—Continued.

2. The complainant in a suit to impress a transaction in the nature of a mortgage, executed in the name of her deceased son, with a trust in complainant's favor, on the theory that she advanced the funds for the loan, and deceased acted as her agent, is not a competent witness as to matters equally within the knowledge of deceased. 3 Comp. Laws, § 10212. *Brown* v. *Brown*, 341.

3. Nor is her husband who participated in the negotiations as complainant's agent, a competent witness as to similar matters, under the statute, as amended by Act No. 239, Pub. Acts 1901. *Id.*

4. Where claimant filed an account as trustee of her father's estate, under the terms of a will giving her the use of his real and personal property during the lifetime of his widow, conditioned upon claimant's supporting and caring for her during her lifetime, the testimony of claimant relating to matters occurring after testator's death, but within the knowledge of the deceased widow, was admissible. *In re Howard's Estate*, 556.

5. Testimony of the son who caused the deeds to be recorded, that deceased directed him to have them placed on record after her death, was competent as to deeds not running to him as grantee or in which he had no interest except as the agent of deceased. *Stubman* v. *Modrack*, 668.

See CRIMINAL LAW (8, 27); EVIDENCE (9); TRIAL (6); WILLS (7).

WOMEN, EMPLOYMENT OF—See CONSTITUTIONAL LAW (8, 9).

WORDS AND PHRASES.

Use is the employment of a thing or applying it to one's service; not the thing itself or any part of it; of a building, use refers to the rent obtainable; of money, the interest. *In re Moor's Estate*, 354.

See ADVERSE POSSESSION (6); CONSTITUTIONAL LAW (1); ESTATES OF DECEDENTS (7); INNKEEPERS (2); INTOXICATING LIQUORS (8).

WORDS IMPUTING WANT OF CHASTITY—See CRIMINAL LAW (19).

WORK AND LABOR—See ESTATES OF DECEDENTS (5); PARTNERSHIP (1); PUBLIC OFFICERS (4).

WRIT OF ERROR—See APPEAL AND ERROR (13, 14).

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